IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,
v.
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

JURISDICTIONAL STATEMENT

KELLER, ROHRBACK, WALDO, MOREN & HISCOCK
KENNETH L. CORNELL and
HAROLD S. FARDAL
Counsel for Appellant

Office and Post Office Address:
1220 IBM Building
Seattle, Washington 98101
Telephone: (206) 623-1900

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

Page

Jurisdictional Statement 1

Opinions Below 2

Jurisdiction 2

Questions Presented 4

Statutes and Constitutional Provisions 5

Statement of the Case 5

How the Federal Questions Were Raised in Proceedings Below 8

The Questions Are Substantial as a Matter of Constitutional Law 10

- First Question 10
- Second Question 13

The Questions Are Substantial as a Matter of Public Importance 14

Conclusion 15

Appendices:

- Appendix A A-1
- Appendix B A-8
- Appendix C A-18
- Appendix D A-19
- Appendix E A-20
- Appendix F A-22
- Appendix G A-24
- Appendix H A-27

TABLES OF AUTHORITY

Table of Cases

	Page
American Oil Co. v. Neill, 380 U.S. 451	10
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282	9
Field Enterprises, Inc. v. Washington, 353 U.S. 806	3, 9
General Motors Corp. v. Washington, 377 U.S. 436	3, 9, 10, 15
Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434	3, 9
Miller Bros. Co. v. Maryland, 347 U.S. 340	10
Northwestern States Portland Cement Co. v. Minnesota 358 U.S. 450	3, 10
Norton Co. v. Dept. of Revenue, 340 U.S. 534, 71 S. Ct. 377 (1950)	10, 11, 12, 13, 14, 17
Wisconsin v. J.C. Penney Co., 311 U.S. 435	13

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3	5
U.S. Const. amend. XIV	5

Statutes

RCW Ch. 34.04	2
RCW 34.04.130	2
RCW Ch. 82.04	5
RCW 82.04.040	5
.060	5
.070	5
.220	5
.270	5
.500	5
62 Stat. 929 (28 U.S.C. § 1257(2))	3, 9

IN THE

Supreme Court of the United States

October Term, 1973

No.

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,
v.
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Standard Pressed Steel Co. appeals from the final judgment of the Court of Appeals of the State of Washington, filed on December 3, 1973, which became final on February 20, 1974, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that the questions presented are constitutionally substantial and of public importance.

The appellee is the Department of Revenue of the State of Washington.

OPINIONS BELOW

The opinion of the Superior Court of the State of Washington for Thurston County, which reviewed the final decision of the Washington Board of Tax Appeals, is not officially reported. A copy of the opinion is attached hereto as Appendix A. The opinion of the Court of Appeals of the State of Washington is reported at 10 Wn. App. 45, 516 P.2d 1043 (1973) and a copy is attached hereto as Appendix B.

JURISDICTION

Standard Pressed Steel Co., considering itself aggrieved by the Washington State Department of Revenue's determination that it was liable for the Washington Business & Occupation Tax on its wholesale sales to the Boeing Company, appealed from this determination to the Board of Tax Appeals as provided for in the Washington Administrative Procedures Act, Ch. 34.04 of the Revised Code of Washington. The Board of Tax Appeals ruled that appellant was properly subject to the Business & Occupation Tax and upheld the assessment of the Department of Revenue. Appellant being aggrieved by the order and final decision of the Board of Tax Appeals, filed a petition for judicial review in the Superior Court of the State of Washington in Thurston County, pursuant to §34.04.130 of the Revised Code of Washington. The Superior Court affirmed the order and final decision of the Board of Tax Appeals and granted judgment for the Department of Revenue. Appellant then filed its notice of appeal with the Washington Supreme Court who transferred the case to the Washington Court of Appeals, Division II, which is an intermediate state appellate court. Oral argument was heard in the Court of Appeals on October 11, 1973, and that court filed its decision of affirmance on December 3, 1973. Appellant thereafter filed a petition for rehearing with that court on December 20, 1973, and the court entered its order denying the petition for rehearing on January 3, 1974, a copy of which order is annexed as Appendix C. Appellant then addressed a petition for review to the Washington Supreme Court, the highest state court in which a decision could be had, and the court, without hearing argument, entered on February 20, 1974, its order denying appellant's petition for review, a copy of which order is annexed as Appendix D.

The Court of Appeals thereafter entered final judgment on February 21, 1974, a copy of which is annexed as Appendix E.

Notice of appeal to this court was filed in the state Court of Appeals, Divsion II, being the court possessed of the record, on March 15, 1974, a copy of which is annexed as Appendix F. The jurisdiction of the Supreme Court to hear this appeal is conferred by 62 Stat. 929, 28 U.S.C. §1257(2). The following cases sustain such jurisdiction: *General Motors Corp. v. Washington*, 377 U.S. 436; *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450; *Field Enterprises, inc. v. State of Washington*, 353 U.S. 806; *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434.

The parties have stipulated that the total amount of Business & Occupation Taxes and interest subject to refund in the event petitioner is the prevailing party in this appeal is the sum of $33,444.91.

QUESTIONS PRESENTED

1. Is a Washington tax on the privilege of engaging in the business of making sales at wholesale within said state repugnant to the due process clause of the United States Constitution when applied to gross receipts from sales of goods manufactured and sold wholly without the state by a foreign corporation to a customer located within the state, when the seller's sole in-state activity consists of the activities of one resident engineer who makes himself aware of the customer's possible potential needs and passes this information to out-of-state offices, and who offers some engineering assistance to the customer in the use of the product, but who does not take or accept orders, and who is not involved at all with sales negotiations, delivery dates or delivery problems, credit checks, or any other aspect of the sale transaction?

Subsidiary to this question are the following:

a. Is such a tax an unwarranted extension of state power beyond its boundaries, so that traditional notions of fair play and substantial justice are offended?

b. Is the imposition of such a tax, a tax on de minimis activities and mere entry into the state?

2. Is the Washington tax on the privilege of engaging in the business of making sales at wholesale within said state repugnant to the commerce clause of the United States Constitution, when applied to the gross receipts from sales of goods manufactured and sold wholly without the state by a foreign corporation to a customer located within the state, when the seller's sole in-state activity consists of the activities of one resident engineer who makes himself aware of the customer's possible potential needs and passes this information on to out-of-state offices and who offers some engineering assistance to the customer in the use of the product, but who does not take or accept orders, and who is not involved at all with sales negotiations, delivery dates or problems, credit checks, or any other aspect of the sales transaction?

Subsidiary to this question are the following:

a. Does the commerce clause prohibit such a risk if multiple taxation where no sales activity of any kind occurs within the taxing state, where the necessary and material incidents of the sale occur outside of the taxing state?

b. Has the state afforded such a taxpayer sufficient protection and benefits to justify the exaction of the tax in return for said benefits?

STATUTES AND CONSTITUTIONAL PROVISIONS

The tax here involved is imposed by Title 82, Ch. 82.04 of the Revised Code of Washington. Pertinent portions of §82.04.040, §82.04.060, §82.04.070, §82.04.220, §82.04.270, and §82.04.500 are set forth in Appendix G.

Article I, §8,, Clause 3 of the Constitution of the United States (commerce clause) and the due process clause of the 14th Amendment of the Constitution of the United States are set forth in Appendix H.

STATEMENT OF THE CASE

This is an appeal by Standard Pressed Steel Co. from the assessment by the State of Washington of a tax on the privilege of engaging within the State of Washington in the business of making sales at wholesale, measured by the

unapportioned gross receipts from the transactions described as follows:

Standard Pressed Steel Co. is a Delaware corporation with production facilities located in Jenkintown, Pennsylvania, and Santa Ana, California. A significant amount of appellant's business involves the manufacture and sale of fasteners (nuts and bolts, generally) to be used in the aerospace industry, and, therefore, Standard Pressed Steel Co. on occasion supplies fasteners to the Washington facilities of the Boeing Company.

The only employee of Standard Pressed Steel present within the State of Washington over the tax years in question was H. Robert Martinson, an engineer, who performed his activities for appellant out of a portion of one room in his home equipped with a desk, telephone, and a file cabinet.

Martinson's primary function was to attempt to inform himself, through contact with Boeing Company qualification engineers, of possible prospective needs of the Boeing Company for aerospace fasteners and to pass this information on to appellant's out-of-state offices, describing the specifications required by the Boeing Company. After receiving this information from Martinson, Standard Pressed Steel would make the critical decision of whether or not to attempt to "qualify" as a supplier either to Boeing or Boeing subcontractors. If appellant should decide to attempt to qualify as a supplier, the company would manufacture sample qualification pieces and forward these to Boeing for qualification tests. Martinson was not in any way involved in this process. If the fasteners met the required specifications, Standard Pressed Steel Co. would become an "approved source" and negotiations possibly leading to a sale would occur between the Boeing Company and appellant's out-of-state offices. Competing aerospace fastener companies would also attempt to qualify as an approved source and would also negotiate with Boeing on possible sales.

The record shows that all dealings in connection with the sale and negotiations concerning sales between Boeing and Standard Pressed Steel were carried on directly between Boeing and appellant's out-of-state offices. Martinson was not consulted during these negotiations but rather was by-passed completely. Martinson had absolutely nothing to do with quoting prices, delivery dates, receiving, soliciting or accepting orders, handling shipments, approving credit, or servicing the sale in any way. No inventories were kept in Washington, and all deliveries were made by appellant directly through a common carrier. If a problem would develop relative to the sale or some aspect of the sale, Boeing did not call on Martinson, but rather had to communicate with appellant's out-of-state offices directly.

The above described duties of Martinson consumed most of Martinson's time with the remainder (approximately 15%) of his time being devoted to "troubleshooting". If Boeing experienced any problems in the use of the product, Martinson's duties were to relay this information to appellant's out-of-state offices, and there the engineers would work to resolve the difficulty with the product. The engineers would then forward their solution to Martinson, who would in turn present the proposed solution to Boeing engineers.

In addition to the above, approximately every six weeks or so, Martinson would arrange hospitality meetings, lasting no more than three days, where appellant's engineers from its out-of-state offices and Boeing engineers would meet and discuss engineering problems in the use of the product. Martinson also would on occasion inform appellant of the identity of various subcontractors, purchasing specialists, and control buyers of commodities for which Standard Pressed Steel was an approved source. Martinson had no contact with such purchasing personnel, however.

HOW THE FEDERAL QUESTIONS WERE RAISED IN PROCEEDINGS BELOW

Throughout the course of the administrative hearings before both the Department of Revenue and the Board of Tax Appeals, the federal questions sought to be reviewed were raised in the initial petition and in the appeal to the Board of Tax Appeals, in the Findings of Fact and Conclusions of Law entered therein, and in the final determination and order, and they were fully argued and briefed in said proceedings.

The federal questions sought to be reviewed were raised in the Superior Court by the petition for review, that court's memorandum opinion and Findings of Fact and Conclusions of Law entered by the Superior Court, and were fully argued and briefed for that court. That court held that the assessment of the tax on appellant did not violate either the commerce clause or the due process clause of the United States Constitution.

The Superior Court entered judgment accordingly, and appellant appealed to the Washington Supreme Court,

who sent the case down to Division II of the Washington Court of Appeals. On appeal, the Court of Appeals sustained the assessment of the tax over appellant's claim that as applied, the statutes involved were invalid as repugnant to the United States Constitution on both interstate commerce and due process grounds. The federal questions were raised in the Court of Appeals by assignments of error in appellant's brief and were fully argued and briefed by both sides. The decision of the Court of Appeals (Appendix B) shows that the federal questions were raised and decided as the basis for its judgment, and that the validity of the pertinent tax statutes as applied to appellant were drawn in question and sustained against a claim of repugnancy to the United States Constitution.

Federal questions were additionally raised in appellant's petition for review addressed to the state Supreme Court and were briefed by the appellee in its answer to appellant's petition for review.

This case, therefore, meets the prerequisites for appeal jurisdiction as defined in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282. *General Motors Corp. v. Washington*, 377 U.S. 436; *Field Enterprises, Inc. v. State of Washington*, 353 U.S. 806; *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, were appeals from the Washington State Appellate Courts involving the same tax as challenged here. This court accordingly has jurisdiction on appeal pursuant to 62 Stat. 929, 28 U.S.C. §1257(2).

THE QUESTIONS ARE SUBSTANTIAL AS A MATTER OF CONSTITUTIONAL LAW

First Question

It is well established that local taxation of a foreign corporation engaged in interstate commerce is justified only where the corporation is engaged in *substantial* income-producing activity in the taxing state. *Northwestern States Portland Cement Co. v. Minn.*, 358 U.S. 450; *Miller Bros. Co. v. Maryland*, 347 U.S. 340; *General Motors Corp. v. Washington*, 377 U.S. 436; and *Norton Co. v. Dept. of Revenue*, 340 U.S. 534.

The decision of the Washington Court of Appeals, if left to stand, establishes a new rule of law, to wit: any activity at all by a foreign corporation within the taxing state, regardless of the type, amount and effect of such activity, where a customer is located within the taxing state, constitutes a sufficient nexus with the state to justify the imposition of a tax on the privilege of making those sales. This is wholly new law, directly conflicting with many holdings of the court, *e.g.*, the *Miller Bros. Co. v. Maryland*, 347 U.S. 340, where this court struck down the imposition of a sales tax even though there were occasional deliveries of purchases into the taxing state, and mailings of notices of special sales to residents of the taxing state; *American Oil Co. v. Neill*, 380 U.S. 451, where this court held that it was constitutionally impermissible to suppose that appellant's in-state activities as a coporation licensed to do business, contributed in any way to the transaction in question where every material phase of the sales transaction occured outside of the state; *Norton Co. v. Department of Revenue*, 340 U.S. 534, where the court stated

that while a concern cannot hold the immunities of an interstate business when it channels business through a local outlet, a concern does not lose its right to do interstate business with tax immunity, per se, by engaging in business within the state.

If this new rule of law is to stand, it should be declared by no less an authority than the United States Supreme Court. No other state has sought to impose a tax on the privilege of conducting business within a state, where the in-state activities are so thin and inconsequential as those performed by appellant's engineer. It is clear that the appellant has not, within the meaning of *Norton*, established, through its one engineer, a local outlet through which appellant gains the advantages of a local business. Appellant rather has approached the market in a manner in which the Washington customer views appellant as remote and distant, with the customer having to deal with a foreign corporation located in distant states.

The court below nevertheless determined that appellant's in-state activity was decisive in establishing and maintaining a Washington market. The conflict with *Norton v. Department of Revenue*, 340 U.S. 534, 71 S. Ct. 377 (1950), is clear. In *Norton*, as to that class of sales held by this court to be exempt, the Norton Co. was performing services within the state in connection with those sales through its corps of resident engineers who did not take or accept orders, but who did consult with customers as to their possible needs, and who offered engineering advice and assistance in the use of the product. Similarly, appellant's only in-state activity in connection with the sales in question is through its engineer, who consults with Boe-

ing as to its possible needs for the product, and who offers some engineering assistance and advice on the use of the product. On the authority of *Norton Co. v. Department of Revenue, supra,* such activities are not decisive factors in the sales and are not a sufficient nexus to support the imposition of a gross receipts tax on the privilege of making such sales. When compared with the incidents of the sale which occur outside of the state, the activity on which the tax is based is *de minimis,* indeed. Appellant's sales are, therefore, exempt from the Washington tax.

Respondent argued below that while the Norton engineers may have serviced customers in all other classes of sales, they were not involved in the direct sales held to be exempt. A careful reading of the opinion shows respondent's contention to be without merit. As noted in *Norton,* the Norton engineers consulted with prospective customers as to their needs and offered technical and engineering advice on the Norton products. Picture these engineers in their office, available to consult with a customer. A customer, or prospective customer, contacts one of these engineers with an engineering problem, or wants to consult with an engineer concerning a Norton product. Contrary to respondent's interpretation of *Norton,* it is certainly not reasonable to assume that prior to consulting with a customer, or prospective customer, the engineer would inquire of the customer as to whether the customer was placing his order direct to Massachusetts and receiving shipment directly back, in which case, the engineer would decline to render services, or whether the customer expected the help of the Chicago retail outlet into a warehouse in this sale, and if so, to what extent. And what would the engineer do if the customer had not yet decided how the order would

be placed? And, further, such an inquiry would only be relevant after the *Norton* decision in any event, unless we are to assume further that the Norton Co. and its engineers were able to predict the outcome of the *Norton* decision. In addition, there is nothing in the *Norton* opinion which states or implies that these engineers were not offering engineering assistance to customers involved in direct sales. On the contrary, the *Norton* opinion describes the engineers as providing engineering services to customers without limitation. If, in fact, the Norton Co. engineers did not provide engineering assistance to a certain class of customers, such a critical fact would certainly have been mentioned by the court in its opinion.

In the present case, where the material activities in connection with the sales occurred outside of the taxing state, the state is attempting to impose a tax on activities which occur beyond its borders, and which results in the state exacting a tax without the taxpayer receiving material benefits from the state in return. This is a violation of due process. *Norton Co. v. Department of Revenue, supra, Wisconsin v. J.C. Penney Co.,* 311 U.S. 435.

Second Question

The decision below held that the imposition of the tax did not violate the commerce clause. Without repeating much of the discussion above concerning the *Norton* case, which also applies here, once again the conflict with *Norton Co. v. Department of Revenue, supra,* is clear. In that case, the court held that sales such as exist in the present case were so clearly interstate in character as to be exempt from the Illinois privilege tax. Like the Norton Co., on its exempt sales, appellant has not established a local outlet

through whom business is channelled, and appellant has received no substantial benefits from the taxing state, for which the state can ask for something in return. To assess the privilege tax on appellant's gross sales to Washington customers is a clear violation of the commerce clause and is in conflict with the holding of this court in *Norton Co. v. Department of Revenue, supra.*

In this case, the material incidents of the transaction occur in either Pennsylvania or California, and the taxing situs of the privilege of conducting the transactions is in Pennsylvania or California. While these states do not have such a privilege tax at the present time, the *risk* of repeated exaction of the tax is clear. To rule that the question of multiple taxation is not properly before this court would subject the appellant to the vagaries and whims of various state legislatures. Appellant submits it is this very type of multiple exposure which the commerce clause was designed to prevent.

THE QUESTIONS ARE SUBSTANTIAL AS A MATTER OF PUBLIC IMPORTANCE

While the amount involved in this appeal is only $33,444.91, the impact of this case is far-reaching. Counsel for the appellant have received numerous inquiries from various in-state and foreign companies doing business with Washington customers, all expressing concern over the Department of Revenue's attempted expansion of the state's taxing power. In every prior instance where the taxing power of a state, including Washington, has been upheld on appeal, far more significant in-state activity in connection with the transaction has been present than exists here. Prior to this decision, it was assumed by the Department

of Revenue and the taxpayer and other businesses similarly situated, the mere presence of a local agent who was not materially involved in the sales transaction and who did not service the sale as such, was not a sufficient nexus to support the tax, and there were not sufficient benefits accorded to such business to justify the assessment. If the decision below stands, the various states, including Washington, can be expected to expand their power to every foreign business having a resident agent within the state, regardless of the amount, effect or nature of the agent's activities. The result to the states, including Washington, will be windfall revenue, which the legislature did not anticipate when they prepared the state's budget.

CONCLUSION

The questions presented were not settled by this court's decision in *General Motors Corp. v. Washington,* 377 U.S. 436. General Motors, through its maze of corporate activity within the State of Washington, some of which, if conceded, subjected it to the state Business & Occupation Tax, can in no way be compared with appellant's one engineer, who does not promote sales and is not involved in any way in the sales transaction. In *General Motors Corp. v. Washington,* this court considered the activities of one of the largest corporations in the world, with the corporation conducting a multitude of state activities. During the tax period involved in the case, the Chevrolet, Oldsmobile and Pontiac divisions had an average of 20 employees resident or principally employed in Washington. General Motors Parts Division employed about 20 more. The activities performed by these employees were substantial and involved *extensive* promotional and service efforts. General Motors

Parts Division further maintained a warehouse of parts and accessories in Seattle, and goods were shipped from Seattle to Washington dealers. The Seattle warehouse employed from 20 to 28 people during the taxing period in question. The activities of General Motors in the State of Washington are in sharp contrast to appellant employing one lone liaison engineer, through whom no local business was channelled, who played no part in the sales transactions to Washington customers, and whose activities are the same as those of the corps of resident engineers of the Norton Co. There is no possible justification for comparing the tremendous organizational and volume of activity of the General Motors Corp. with the one lone engineer of Standard Pressed Steel who worked out of part of one room of his home.

The decision below is a wholly new approach to the existing constitutional law in this area and is a radical departure from precedent. This new approach looks only at the mere fact of entry into the state, regardless of the nature or extent of the entry and activity within the state, and ignores the clear holding of prior decisions of this court requiring that the in-state activity must be substantial and must materially promote sales.

The result of the decision below, if left to stand, is that a taxpayer who has not established a local outlet and does not have the advantages of a local outlet, nevertheless, has lost its immunity from taxation, and the state will be exacting tax without providing benefits in return. This introduces serious uncertainty in interstate business. Firms once considered exempt will now be considered fair game and will be in jeopardy. Such a weakening of the commerce

clause protections will result in interstate business receiving only negligible protection, if at all, under the commerce clause.

If the decision below is left to stand, *Norton Co. v. Department of Revenue, supra,* will be overruled without affirmatively stating the same. Activities previously held by this court to be insufficient to justify a Business & Occupation Tax will now be sufficient. Appellant respectfully submits the decision below extends the taxing power of the state to the detriment of the national market. The questions presented by this appeal are constitutionally substantial and of great public importance and should be decided by this court after full briefing on the merits and oral argument.

Respectfully submitted,

KELLER, ROHRBACK, WALDO, MOREN & HISCOCK
KENNETH L. CORNELL and
HAROLD S. FARDAL
Counsel for Appellant

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STANDARD PRESSED STEEL CO., *Appellant*, v. DEPARTMENT OF REVENUE, *Respondent*.	No. 44750

ORAL DECISION OF THE COURT

(June 16, 1972)

THE COURT: Well, this matter comes before the court upon the appeal of the Board of Tax Appeals involving solely a wholesale tax, or wholesale tax activity involving the B & O tax.

We obviously have a foreign corporation who deals primarily and for the purpose of the record solely with the Boeing Company. I do not intend to go into all of the evidence, but apparently it is not in dispute that the State imposes its position concerning the fact that Mr. Martinson's operation was necessary so that the Appellant, one, could become aware of its products which the Boeing Company might be able to use, two, obtain the engineering design for such products, three, secure the testing of sample products to qualify the products for sale to the Boeing Company, four, resolve problems in the use of the products after receipt and use by the Boeing Company, five, obtain and retain good will and working rapport with Boeing personnel, and six, secure and update lists of Boeing pur-

chasing specialists or control buyers and the commodities for which they were responsible for the use of the invoicing personnel at the Appellant's home office.

The question before the court, of course, is whether in general but specifically in relation to the six enumerated factual matters there is sufficient interstate activity under which the B & O tax should levy.

I do not believe that the court has to go into the argument here concerned as to the court's position in the determination of the facts along with the Conclusions of Law which must result therefrom. By that I mean the argument as to whether this court is bound by the Administrative Procedures Act, or whether in effect this court is free to take these facts and apply them to the law as the court sees fit.

Now, of course, we have discussed, and I will take them up singly, the United States Supreme Court decisions involving General Motors and also Norton. The court makes specific reference to General Motors Corporation versus State, which is found in 60 Wn. (2d), at page 862, and B. F. Goodrich Company versus State, in 38 Wn. (2d), page 663. The court has studied those two cases very carefully, not only in relation to their content but, of course, by reference to that of Norton. I do not find any inconsistency between these two cases.

The General Motors Corporation case is on two particular bases. One, the importance of having an office within the State, as, of course, Mr. Martinson had in the State of Washington. I don't think that is really an issue, as a result of that case, because that in itself, of course, cannot determine the question before the court at the present time as

a sole and determining factor. The General Motors case concludes and makes its decision primarily upon the basis of the multitude of activities which were carried on by General Motors in the State of Washington, and in effect held that because of the multitude of association that the taxpayer could not show sufficient disassociation.

There are some interesting statements made in this case, some of which are important and some of which are not as to this court, but I wish to quote from General Motors at Page 874:

> "It suffices to say that we are not persuaded that any case of the United States Supreme Court or of this court dictates the approach that presence or absence of a local office is the controlling factor."

This court would like to state in that relation, although as I have stated this pertains to an office, I think what the Supreme Court is saying in effect is that no one single aspect of activity can itself be determinative of doing business in this State.

The case goes on to say:

> "To allow tax immunity to those who direct business activities from a point just across the state line, regardless of the quantum and effect of local activity, would amount to a discrimination against those who have located offices within the state. And taxation of those who perform de minimus activities through a local office would be unreasonable and unjust.
>
> "Although location of an office within the state has been of assistance in characterizing the extent of operations and activities within a state, the mere physical presence of an office within the state has never been the sole criterion for validating a state's assessment of a tax. Conversely, absence of a local office does not render the conclusion automatic that

sufficient nexus to validate a tax is lacking. The essential inquiry must be directed to the amount and effect of the activities involved and not the form."

To this court that is one of the keys as to this case. The essential inquiry must be directed to the amount and effect of the activities involved and not the form of the operations, and I don't think that the court means by that that we must show quantity. For lack of a better term the court would like to use the word "quality," as it reflects in the doing of business being subjected to B & O tax.

I would also like to state that on Page 875 in commenting upon the varied activities of General Motors the court stated:

"Yet the activities undeniably have a very great effect in terms of increasing total retail sales in Washington, thereby increasing also wholesale sales."

Of course, in recalling the facts of that case you will recall that they felt they ought to go in and promote retail sales so that they could get more wholesale sales, and they are holding here that those activities, well, not directly but indirectly, since they were assisting in the wholesale sales, that they could not claim the immunity.

They go on:

". . . where extensive business activity occurs within a state, taxation can only be avoided upon a showing that the activities are disassociated from the sales in question. Therefore, it is incumbent upon General Motors to make a showing of disassociation or, at a minimum, some degree of disassociation in order to remove from taxation that portion of sales not attributable to that activity. 'Although the mechanical aspect of the wholesale sales of General Motors to retail dealers occur outside of the state, the substance of each transaction occurs in Washington where the

customer is located and where the demand for the manufactured product exists, in very large degree, as a result of General Motors promotional activities.' "

Now, let's look at Goodrich. I quote:

"It agreed that, where a corporation has gone into a state to do local business by state permission, and has set up an office which performs service helpful to its competition for local trade, it may be taxed like any other vendor for sales made in connection with that business. But this, the court held, does not prevent its being tax-free with respect to sales separate and distinct from its local business; though the burden is on the taxpayer to show this disassociation, where it it demonstrated, the sales involved are interstate commerce, and entitled to the same immunity from state taxation as if the corporation has never established an office within the borders of the state."

In reference now to Norton they stated:

"The majority held that, in the absence of a showing that the services rendered by the Chicago office were not decisive factors in establishing and holding the Illinois market . . .

"In the absence of a showing that the services rendered by the Chicago office were not decisive factors in establishing and holding the Illinois market."

They go on to say:

"For our purposes, the crucial sentence in the majority opinion, and the one which sets forth the test we must apply in deciding this case, is the following:

" 'Although the concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business.' "

I think that the evidence is such in this case, gentlemen, that any one of the factors of which I have enumerated as

factually being evidentiary in nature in itself would probably not meet the test. I do not likewise believe that the solicitor cases would be appropriate under this form of taxation, but I do believe that the court must look at all of the facts and the cumulative effect upon the doing of busness and invoking participation in the sales between the Appellant and the State of Washington. If we look at it in that manner, the fact that there is by Mr. Martinson's activities an attempt to hold the market by his services, if we tackle the fact that contrary to solicitation that he must have only the one purpose and that is to provide sufficient facts to his employer to make a sale, we cannot under the law of these two cases, of which there is no conflict, say that the taxpayer has overcome the burden of showing the disassociation, which is the key to the question before the court. I certainly do not say and do not hold that they are a part of the sales organization, but as I understand these cases that isn't the question. The point is, has the taxpayer overcome the burden of disassociation to the extent that they are not conducting business within our borders.

This I do not feel can be held when we take the cumulative facts as to what his purpose in this State is. I do not think that General Motors is in conflict because of the very essential inquiry which they state must be directed to the amount and effect of the activities involved and not the form. I don't think it is important at all but that we have one man, when he controls all of the Boeing work, as distinguished from having thirty-five various offices throughout the State, because the amount and effect of those activities is every bit as violative as if we had a volume type of approach.

In conclusion I would like to state that I am not reaching the point of the Administrative Procedures Act because my conclusion is that there are sufficient facts before the court if I just took it at a de novo position, for the sake of argument, to have found that under the two cases of which have been presented and references thereto that there has been a failure of the taxpayer to prove that there is not interstate activity which would not subject the manufacturer to the B & O tax or concerning the wholesale sales. So under those cases, and the fact that I have interpreted them accordingly, taken with the facts on the record of which are admitted, I feel that the burden has not been met by the manufacturer, which only means that the court must sustain the decision of the Board.

CERTIFICATE

STATE OF WASHINGTON }
COUNTY OF THURSTON } ss.

I EUGENE E. BARKER, an Official Court Reporter of the State of Washington, do hereby certify that the foregoing transcript of the Oral Decision of the court, presented in the above-entitled and number Cause by the Honorable FRANK E. BAKER, Judge of the Superior Court of the State of Washington, in and for the County of Thurston, on the 16th day of June, 1972, was reported by me on said date, and reduced to typewriting under my direction.

I further certify that said transcript of the Oral Decision of the Court, as above transcribed, is a full, true and correct transcript of my machine shorthand notes of the aforementioned matter.

DATED AND SIGNED this ..... day of June, 1972.

Official Court Reporter

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STANDARD PRESSED STEEL COMPANY, *Appellant*, v. DEPARTMENT OF REVENUE, STATE OF WASHINGTON, *Respondent*.	No. 1022-II Division Two Filed Dec. 3, 1973

ARMSTRONG, J.—This is an appeal from a Superior Court judgment affirming the final decision of the Board of Tax Appeals upholding the imposition of this state's business and occupation tax upon plaintiff, Standard Pressed Steel Company. It was the contention of plaintiff that imposition of the tax was unconstitutional. We hold that levying of the tax was constitutionally permissible.

The hearings below before both the Board of Tax Appeals and the trial court were conducted on the basis of the deposition of H. Robert Martinson, an employee of plaintiff, various exhibits introduced in connection with the deposition, and the pleadings in the case. There was no "live testimony." For this reason, it is unnecessary for us to consider the five findings of fact assigned as error by the plaintiff, because we may approach review of the plaintiff's contentions as indicated by the Supreme Court in *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969), quoting with approval the following language from *Carlson v. Bellevue*, 73 Wn.2d 41, 48, 435 P.2d 957 (1968):

> The appeal, therefore, from the trial court's judgment brings before us, in the same form and content, the identical documents and records presented to the trial court. Under these circumstances, we are not bound by disputed findings of the trial court to the same extent and in the same manner as where the trial court's findings rest upon the oral testimony of witnesses. . . . We are entitled to make our own examination of the records thus presented and determine the merits of the contentions going to the issue of arbitrary, capricious, and unreasonable legislative action. (Citations omitted.)

In other words, this court on appeal stands in the same position as the trial court in looking at the facts of the case and should review the record de novo. *Anderson v. Island County*, 81 Wn.2d 312, 316, 501 P.2d 594 (1972).

Both *Anderson* and *Smith* were zoning cases and the standard of judicial review was whether there had been arbitrary, capricious, and unreasonable legislative action. In this case, the scope of judicial review is pursuant to the Administrative Procedures Act and limited by the provisions of RCW 34.04.130(6).[1] Our review here is to determine from the facts whether the Board of Tax Appeals' decision sustaining imposition of the business and occupation tax was in violation of constitutional provisions.

The record discloses that plaintiff, Standard Pressed Steel Company, is a foreign corporation with production facilities located in Jenkintown, Pennsylvania and Santa

1. RCW 34.04.130(6) provides: "(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
(a) in violation of constitutional provisions; or
(b) in excess of the statutory authority or jurisdiction of the agency; or
(c) made upon unlawful procedure; or
(d) affected by other error of law; or
(e) clearly erroneous in view of the entire record as submitted and the public policy contained in the the act of the legislature authorizing the decision or order; or
(f) arbitrary or capricious."

Ana, California. A significant amount of plaintiff's business involves the manufacture and sale of fasteners (nuts and bolts, generally) to be used in the aerospace industry, and plaintiff's principal customer in this state during the tax years in question was the Boeing Company in Seattle.

The only employee of Standard Pressed Steel present within the State of Washington over the tax years in question was H. Robert Martinson, a "sales engineer." Martinson performed his activities for Standard Pressed Steel out of a portion of a room in his home equipped with a desk, telephone, and a file cabinet.

Martinson's primary function was to work with Boeing's engineers in the initial phases of aerospace design and construction, and through contact with Boeing engineers inform himself of possible prospective needs of the Boeing Company, and its various subcontractors, for aerospace fasteners. He would then initiate a product engineering request describing in detail the specifications required by Boeing and send this information on to plaintiff's out-of-state offices. After receiving this information from Martinson, plaintiff would make a decision as to whether or not Standard Pressed Steel would attempt to "qualify" as a Boeing supplier of a particular fastener; that is, Boeing determined who could be a supplier of component parts by qualification tests done at their Seattle facilities. If plaintiff would manufacture sample qualification pieces and forward these to Boeing for qualification tests. If the fasteners met the required specifications, Standard Pressed Steel would become an "approved source" and the Boeing Company would then enter into negotiations with plaintiff's out-of-state offices for purchase of the fasteners.

The record reflects that all such dealings and negotiations between Boeing and Standard Pressed Steel were carried on directly between Boeing and plaintiff's out-of-state offices. Martinson was bypassed completely, except to the extent that he periodically informed plaintiff of the various subcontractors, purchasing specialists, and control buyers of commodities for which Standard Pressed Steel was an approved source. Martinson had nothing to do with quoting prices, delivery dates, receiving, soliciting, accepting orders, handling shipments, or approving credit. No inventories were kept in this state, and all deliveries were made by plaintiff directly through a common carrier.

The above qualification process consumed approximately 80 to 90 percent of Martinson's time, with the remainder devoted to "troubleshooting." If Boeing experienced any problems in their use of the fasteners supplied by the plaintiff, Martinson's duties were to relay this information to plaintiff's engineers at the out-of-state offices, and there the engineers would work to resolve any difficulties with the product in their laboratories. The engineers would then forward their solution to Martinson, who would present the proposed solution to Boeing's engineers in Seattle. In addition, approximately three days every six weeks Martinson would set up meetings between Boeing engineers and visiting groups of plaintiff's engineers to visit and discuss engineering problems.

Based on the above activity within the State of Washington, the state contends that Standard Pressed Steel Company is subject to the business and occupation tax measured by gross receipts from plaintiff's sales to the Boeing Company.

In assessing the constitutionality of imposing the business and occupation tax in this case, we may start with the undisputed proposition that a state may not tax the privilege of engaging in interstate commerce, but may impose a tax that is incident upon an activity that is peculiarly local and distinct from interstate commerce. *General Motors Corp. v. Washington,* 377 U.S. 436, 12 L. Ed. 430, 438, 84 S. Ct. 1564 (1964); *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 82 L. Ed. 823, 58 S. Ct. 546 (1938). In other words, a state *does* have the right to tax the privilege of doing *local* business, and if there is a taxable incident within the jurisdiction, the tax does not offend the commerce clause of the constitution as a tax on the privilege of doing interstate business. *Greyhound Lines, Inc. v. Tacoma,* 81 Wn.2d 525, 527, 503 P.2d 117 (1972); *Rena-Ware Distrib. Inc. v. State,* 77 Wn.2d 514, 519, 463 P.2d 622 (19710).

Here the record clearly discloses that Standard Pressed Steel Company employed Mr. Martinson as a resident agent within this state to conduct business activities with the Boeing Company, in part out of his Washington residence as an office, so that Standard Pressed Steel could: (1) become aware of which of its products the Boeing Company might be able to use; (2) secure the testing of sample products to qualify the products for sale to the Boeing Company; (3) obtain the engineering designs for such products; (4) resolve problems in the use of the products after receipt and use by the Boeing Company; (5) obtain and retain goodwill and working rapport with Boeing personnel; and (6) secure and update lists of Boeing purchasing specialists or control buyers, and the

commodities for which they are responsible, for the use of the personnel at the plaintiff's home office.

We are of the opinion that the foregoing substantial services constituted a sufficient peculiarly local and distinct taxable incident within the State of Washington such that imposition of the business and occupation tax was not on the privilege of engaging in interstate commerce, but rather on the privilege of doing local business.

Our inquiry does not end here, however, for even when there is a peculiarly local activity, the measure of the tax must be reasonably related to those local incidents. *General Motors Corp. v. Washington, supra.* A tax measured by gross receipts from sales by a foreign corporation to customers within the state must be closely related to the local activities of the corporation, for due process requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. v. Maryland,* 347 U.S. 340, 345, 98 L. Ed. 774, 74, S. Ct. 535 (1954).

It might be argued that since gross receipts from plaintiff's sales to the Boeing Company represent extensive manufacturing and operational activities in Pennsylvania and California, such gross receipts are not fairly related to the activities of Mr. Martinson. However, this contention was discussed in *Dravo Corp. v. Tacoma,* 80 Wn.2d 590, 599, 496 P.2d 504 (1972), as follows:

> The fact that the value which the gross receipts measure is, in large part, the result of activity *outside* the territorial limits of the taxing jurisdiction does not mean the gross receipts are not fairly related to the activity *within* the jurisdiction. There is no constitutional objection to resorting to extraterritorial

elements in determining the *measure* of a tax. *General Motors Corp. v. State*, 60 Wn.2d 862, 874, 376 P.2d 843 (1962), *aff'd.*, in *General Motors Corp. v. Washington, supra*; *Wisconsin v. J.C. Penney Co., supra*, at 445, *rehearing denied*, 312 U.S. 712, 85 L. Ed. 1143, 61 S. Ct. 444 (1941); *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 425, 81 L. Ed. 1193, 57 S. Ct. 772, 112 A.L.R. 293 (1937).

Plaintiff relies on *Norton Co. v. Department of Revenue*, 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377 (1951), in support of the contention that Standard Pressed Steel's sales to the Boeing Company were not sufficiently related to Mr. Martinson's activities to justify the tax. In that case, the Norton Company was a Massachusetts corporation that manufactured and sold abrasive machines. It sought a refund for taxes paid under the provisions of Illinois' occupation tax. The Norton Company had no salesmen within Illinois, but it did maintain an office and warehouse in Chicago where it kept a substantial inventory. The company also had a group of engineers available to supply engineering and technical advice.

The United States Supreme Court upheld the tax where the measure of the tax attributed to the Chicago branch income from all sales that utilized it either in receiving orders or distributing goods. The court noted that the taxpayer had not established that such services as were rendered by the Chicago office were not decisive factors in holding that market. On the other hand, the court held that proceeds from orders sent directly to Massachusetts by the customer and shipped directly to the customer from Massachusetts were not reasonably attributable to the local business, and therefore not subject to the Illinois tax. *Norton Co. v. Department of Revenue, supra.*

From this holding plaintiff argues that since the presence of consulting engineers in Illinois was not enough to justify the tax on the interstate items in *Norton*, the activities of Mr. Martinson should not sustain the tax on sales made directly between Boeing and plaintiff's out-of-state offices in this case.

However, plaintiff overlooks the fact that implicit in the *Norton* decision was the conclusion that the activities of the local Chicago office, including the activities of the engineers, were not decisive factors in holding or establishing the market reflected by the direct, interstate sales. For example, the Norton decision was construed by our State Supreme Court as follows: "We only interpret the *Norton Co.* case as holding that such a tax may not be levied upon the proceeds from sales with which the local outlet had nothing to do." *B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 675, 231 P.2d 325 (1951).

We are satisfied that the local activities of Mr. Martinson were instrumental in establishing and maintaining the Boeing Company as a market for the sales giving rise to the proceeds by which the state seeks to measure this tax. We therefore conclude that because the gross receipts from plaintiff's sales to the Boeing Company were reasonably related to the local incidents of the tax, imposition of the business and occupation tax here was not offensive to due process.

Plaintiff contends that the state's imposition of the business and occupation tax creates a multiple burden of taxation on plaintiff's interstate commerce. It is of course true that in judging the state's power to levy a tax measured by activities connected with interstate commerce, the follow-

ing determinations represent guidelines presently employed:

> (1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage when competing locally; *the discrimination test.*
>
> (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; *the multiple burden test.*

McKinnis Travel Service v. State, 78 Wn.2d 229, 232, 472 P.2d 392 (1970); *Public Utility Dist. No. 2 of Grant County v. State,* 82 Wn.2d 232, 237, 510 P.2d 206 (1973).

In this case no argument has been advanced that discrimination against interstate commerce exists; nor could it be so argued, since this tax applies to all "businesses" in the State of Washington whether they engage in interstate commerce, intrastate commerce, or both. *McKinnis Travel Service v. State, supra.* As to the contention that the tax creates a multiple burden, we note that the United States Supreme Court, as well as the Supreme Court of this state, has held that the burden is upon the taxpayer to affirmatively show that its activities are subject to taxation elsewhere. *General Motors Corp. v. Washington, supra*; *Washington-Oregon Shippers Cooperative Ass'n. v. Schumacher,* 59 Wn.2d 159, 367 P.2d 112 (1961). In this case we find no such affirmative showing other than the unsupported assertion in plaintiff's appellate brief that a multiple burden has been created.

For the foregoing reasons, we find no constitutional infirmities derived from either the due process or commerce clauses to preclude the state from levying a tax upon the

local activities of Standard Pressed Steel Company. Further, it was constitutionally permissible to measure that tax by the value of gross receipts from sales to the Boeing Company's facilities in this state. We therefore sustain the imposition of the business and occupation tax in this case.

Affirmed.

s/ ARMSTRONG, J.

WE CONCUR:

s/ PEARSON, C. J.

s/ PETRIE, J.

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STANDARD PRESSED STEEL COMPANY, *Appellant.* v. DEPARTMENT OF REVENUE, STATE OF WASHINGTON, *Respondent.*	No. 1022-II ORDER DENYING PETITION FOR REHEARING OR MODIFICATION

The court has considered this petition for rehearing or modification and has determined that it should be denied. Accordingly, it is

ORDERED that the petition is denied.

DATED this 3rd day of January, 1974.

/s/ VERNON R. PEARSON

Chief Judge

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STANDARD PRESSED STEEL COMPANY, *Petitioner,* v. THE DEPARTMENT OF REVENUE, *Respondent.*	No. 43099 (1022-II) ORDER DENYING PETITION FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause together with the answer thereto, it is

ORDERED that the petition be and it is hereby denied.

DATED this 20th day of February, 1974.

By the Court:

/s/ FRANK HALE

Chief Justice

APPENDIX E

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STANDARD PRESSED STEEL COMPANY, *Appellant*, v. THE DEPARTMENT OF REVENUE, *Respondent*.	REMITTITUR No. 1022-II Thurston County No. 44750

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on December 3, 1973, became the final judgment of this court in the above entitled case on February 20, 1974. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows: Six hundred twenty two dollars and 76/100 ($622.76) in favor of respondent and against appellant and against appellant's surety not to exceed the limit of the surety bond.

Petition for Rehearing denied January 3, 1974.

Petition for Review denied February 20, 1974.

CC TO:
Kenneth L. Cornell
Slade Gorton
Clerk of Supreme Court
Reporter of Decisions

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 21st day of February, A. D. 1974

[SEAL]

/s/ LAURENCE P. GILL

Clerk of the Court of Appeals, State of Washington, Division II.

APPENDIX F

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STANDARD PRESSED STEEL CO., a foreign corporation, *Appellant*, v. DEPARTMENT OF REVENUE, *Appellee*.	No. 1022-II NOTICE OF APPEAL

TO: Department of Revenue, State of Washington, Appellee

AND TO: Slade Gorton, Attorney General, and William D. Dexter, Assistant Attorney General, attorneys for appellee

AND TO: The Clerk of the Above Entitled Court

YOU AND EACH OF YOU are hereby notified that appellant Standard Pressed Steel Co., a foreign corporation, being aggrieved by reason of the opinion of the Court of Appeals of the State of Washington, Division II, filed on December 3, 1973, which became a final judgment on February 20, 1974, does hereby appeal to the Supreme Court of the United States from that certain opinion made, rendered and entered in this court and cause on the 3rd day of December, 1973 and which became final judgment of this court in the above entitled case on February 20, 1974, and from each and every part of said opinion and judgment adverse to the appellant. On the basis that the Business &

Occupation Tax statutes of R.C.W. 82.04 are repugnant to the United States Constitution as applied to appellant and as construed by the court, appellant takes this appeal pursuant to 28 U.S.C. §1257(2).

DATED this 12th day of March, 1974.

/s/ HAROLD S. FARDAL
Of Attorneys for Appellant

NOTICE OF APPEAL

STATE OF WASHINGTON } ss
County of King }

The undersigned, being first duly sworn, on oath states: That on this day affiant deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of appellee, containing a copy of the document to which this affidavit is attached.

/s/ HIROKO YOSHIDA

Subscribed and Sworn to before me this 12th day of March, 1974.

/s/ KENNETH L. CORNELL
Notary Public in and for the State of Washington
Residing in King County

APPENDIX G

82.04.040 "Sale," "casual or isolated sale." "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.04.050. It includes renting or leasing, conditional sale contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It also includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

"Casual or isolated sale" means a sale made by a person who is not engaged in the business of selling the type of property involved.

82.04.060 "Sale at wholesale," "wholesale sale." "Sale at wholesale" or "wholesale sale" means any sale of tangible personal property which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property. if such charge is expressly defined as a rental sale by RCW 82.04.050 when rendered to or for consumers: *Provided,* That the term "real or personal property" as used in this section shall not include any natural products named in RCW 82.04.100.

82.04.070 "Gross proceeds of sales." "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

82.04.220 Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds or sales, or gross income of the business, as the case may be.

82.04.270 Tax on wholesalers, distributors

(1) Upon every person except persons taxable under subsections (1) or (9) of RCW 82.04.260 engaging within this state in the business of making sales at wholesale: as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredth is one percent.

(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided,* That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying forty-four one-hundredths of one percent of the value of the article

so distributed as of the time of such distribution: *Provided,* That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: *Provided further,* That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.

82.04.500 Tax part of operating overhead. It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

APPENDIX H

REGULATION OF COMMERCE 1 §8, cl. 3

Section 8, Clause 3. Regulation of commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

SINGLE APPENDIX

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE
COURT OF APPEALS, DIVISION II

JULY 31, 1974

FILED MAY 13, 1974
PROBABLE JURISDICTION NOTED JUNE 17, 1974

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

	Page
Relevant Docket Entries	1
Determination by Department of Revenue	3
Final Determination by Department of Revenue	9
Order and Final Decree of Board of Tax Appeals	13
Petition for Judicial Review	23
Findings of Fact and Conclusions of Law	26
Judgment	30
Notice of Appeal to Washington Supreme Court	32
Opinion of the Court of Appeals of the State of Washington, Division Two	33
Petition for Rehearing	43
Order Denying Petition for Rehearing or Modification	43
Petition for Review	47
Respondent's Answer to Petition for Review	59
Order Denying Petition for Review	71
Remittitur	72
Notice of Appeal to United States Supreme Court	74
Deposition of Robert Martinson, including Exhibits A Through L	75

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

JULY 31, 1974
JURISDICTIONAL STATEMENT FILED MAY 13, 1974
PROBABLE JURISDICTION NOTED JUNE 17, 1974

SINGLE APPENDIX

Attorneys for Appellant:
HAROLD S. FARDAL, ESQ.
KENNETH CORNELL, ESQ.
KELLER, ROHRBACK, WALDO, MOREN & HISCOCK
1220 IBM Building
Seattle, Washington 98101
Telephone (206) 623-1900

Attorneys for Appellee:
SLADE GORTON
Attorney General
TIMOTHY R. MALONE
Sr. Assistant Attorney General
415 General Administration Bldg.
Olympia, WA 98504
Telephone: (206) 753-5528
WILLIAM D. DEXTER
Assistant Attorney General
415 General Administration Bldg.
Olympia, WA 98504
Telephone: (206) 753-5515

RELEVANT DOCKET ENTRIES

Title of Case:

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Respondent.

DATE	PROCEEDINGS	SINGLE APPENDIX PAGE NO.
1970		
July 24	Determination by Dept. of Revenue	3
October 21	Final Determination by Dept. of Revenue	9
1971		
April 23	Hearing before Board of Tax Appeals	
May 26	Order and Final Decision by Board of Tax Appeals	13
June 24	Petition for Judicial Review	23
1972		
June 16	Hearing and oral argument in Thurston County Superior Court	
October 10	Findings of Fact, Conclusions of Law and Judgment	26
October 11	Notice of Appeal to Washington Supreme Court	32
1973		
January 30	Appellant's Brief on Appeal	
April 30	Respondent's Brief on Appeal	
September 11	Appellant's Reply Brief	
October 11	Hearing before Court of Appeals of State of Washington, Division II	

December 3	Opinion of Court of Appeals filed	33
December 20	Petition for Rehearing	43
1974		
January 3	Order Denying Petition for Rehearing or Modification	46
January 16	Petition for Review to Washington Supreme Court	47
January 25	Respondent's Answer to Petition for Review	59
February 20	Order Denying Petition for Review	71
February 21	Remittitur by Court of Appeals	72
March 14	Notice of Appeal to United States Supreme Court	74
March 14	Praecipe for Certification and Transfer of Record to the United States Supreme Court	
May 13	Appeal Docketed in United States Supreme Court	
May 31	Transmission of Record from Washington Court of Appeals	
June 17	Probable Jurisdiction Noted.	

[Letterhead omitted in printing]

BEFORE THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON

In the Matter of the Petition
For Refund and Petition for
Correction of Assessment of

STANDARD PRESSED STEEL COMPANY
Post Office Box 608
Benson East
Jenkintown, Pennsylvania 19046

DETERMINATION
No. 70-67
Registration No.
P409 011 840

TAXPAYER REPRESENTED BY: H. Robert Martinson, Engineer; Elizabeth J. Bracelin, Attorney; and Robert Keller, Attorney

DEPARTMENT OF REVENUE REPRESENTED BY:

INTERPRETATION AND APPEALS DIVISION: Don R. McCuiston, Hearing Officer

FIELD OPERATIONS DIVISION: S. Aronin, Audit Unit Supervisor

DATE AND PLACE OF CONFERENCE: March 16, 1970; Seattle, Washington

FACTS:

The taxpayer manufactures industrial and aerospace fasteners at Jenkintown, Pennsylvania and Santa Ana, California. In the state of Washington these products are sold to companies involved in the aerospace and aviation industries; the principal customer being The Boeing Company in Seattle. An audit, dated November 28, 1969, has been prepared from the accounting records maintained for the period from January 1, 1965 through June 30, 1969. This audit resulted in a tax and interest deficiency of $2,681.38 and tax assessment 59849 was issued for this amount on December 30, 1969. The assessment, plus extension interest, is unpaid at this time.

TAXPAYER'S EXCEPTIONS:

The taxpayer has voluntarily paid the Wholesaling—All other business and occupation tax, on periodic returns filed, measured by the majority of its sales to local customers. However, some of these sales were not reported (apparently through inadvertence) and this accounts for the total deficiency reflected by the audit. The taxpayer feels none of this tax is correctly due as its local activity is insufficient to generate the liability. It was explained that until February 11, 1966 a sales office was maintained at 1012 Summit Avenue in Seattle. This office was closed on this date and thereafter the taxpayer has had only one product specialist in the state. This is Mr. H. Robert Martinson, an engineer employee, who is a Washington resident residing at 2719 S.W. 322nd Street in Federal Way, Washington. Mr. Martinson operates out of his home and his primary duty is to consult with Boeing Company personnel regarding the company's anticipated needs and requirements for aerospace fasteners as well as discuss any difficulties which might develop with the product after delivery. He also consults, but to a much lesser extent, with a few other customers in the Seattle area. Since the facts are basically similar regarding sales to all customers included in the audit, we will confine this discussion to The Boeing Company situation. The information regarding future requirements for fasteners, as well as information regarding any product difficulties which he is unable to reconcile, is forwarded by Mr. Martinson to either Jenkintown, Pennsylvania or Santa Ana, California for action by the company. Information gathered by Mr. Martinson regarding Boeing Company's future needs is used by the taxpayer to determine if it should attempt to qualify for the

business. If it does, a sample of its proposed product is sent directly to Boeing and, if accepted, shipment of the product is made by common carrier from an out-of-state point directly to Boeing. Preliminary price and delivery data as well as orders and payments all run directly between Boeing and the taxpayer with no intervention by Mr. Martinson.

Under these facts it is stressed that the taxpayer's local presence in Washington is limited to one resident employee who acts solely as a consulting engineer and who has absolutely nothing to do with the mechanics of completing sales. This one employee's function is characterized as being similar to a conduit through which technical information passes to the company to enable it to keep abreast of developments in its product line. As judicial authority for believing this degree of local activity is insufficient to support this state's business and occupation tax, the taxpayer refers to the decision of this state's Supreme Court in *B.F. Goodrich v. The State of Washington*, 38 Wn.2d 663 (1951). In that case the court pointed out that it was bound by the then recent decision of the United States Supreme Court in *Norton Company v. Department of Revenue of Illinois*, 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377. The *Norton* case involved an attempt by the State of Illinois to levy its gross receipts retailers occupation tax on sales of abrasive machines and supplies manufactured in Massachusetts and sold in Illinois. In addition to its rather extensive selling activity in Illinois, the Norton Company also "stood ready to receive complaints and to give engineering and technical advice." The court ruled that the Illinois tax did not apply to sales in which orders were sent from Illinois customers directly to the Norton Com-

pany's home office in Massachusetts and were filled by shipment directly to the customer. The taxpayer feels that its situation is extremely similar, if not identical in pertinent points, with that considered by the court in the *Norton* case and requests consideration of its petition on these grounds.

DISCUSSION:

In our opinion the *Norton* and *Goodrich* decisions are not controlling in this situation. Rather, we believe the much more recent decision of the United States Supreme Court in *General Motors Corporation v. Washington*, 377 U.S. 436, 12 L. Ed. 430, 84 S. Ct. 1564, constitutes the authoritative case law on the subject. As an aside we might point out that, in our opinion, the *Norton* case is distinguishable on the facts since there is no evidence that the Norton Company engineers who stood ready to give technical advice were actually involved in the direct sales ruled exempt by the court. In any event, the *General Motors* case involved a situation where several different types of employees conducted activities in Washington which were not directly involved in the mechanics of completing sales but which, of course, were indispensable factors to General Motors in gaining and holding its share of the Washington market. The Court said, on Page 438, that

> . . . The Pontiac and Oldsmobile Divisions of General Motors had no branch offices in Washington. But these divisions had district managers, service representatives, and other employees who were residents of the State and who performed substantial services in relation to General Motors' functions therein, particularly with relation to the establishment and maintenance of sales, upon which the tax was measured. We place little weight on the fact that these divisions had no formal offices in the State, since in actuality the homes of these officials were used as corporate offices. Despite their label as "homes" they served the corporation just as effectively as "offices."

In our judgment, the services rendered locally by Mr. Martinson, while not directly involved in the mechanics of sales, are also substantial in relation to this particular taxpayer's functions since such services directly result in the "establishment and maintenance of sales," as in the *General Motors* case. In other words, the taxpayer has approached the Washington market through the presence and efforts of Mr. Martinson and we believe this is sufficient nexus, under the rationale of the *General Motors* decision to generate a business and occupation tax liability on the taxpayer's sales. It goes without saying that the taxpayer had good and sufficient reason for basing Mr. Martinson in this state. We think it obvious that these reasons are primarily related to the ultimate generation of sales and handling of customer relations. We are convinced that these activities, rather than being merely insignificant, constitute vital and contributing services toward securing, maintaining and holding a share of the local market for the taxpayer and, as the court said in the *General Motors* case, constitutes a business privilege for which the state can require a return.

We recognize that the taxpayer's local activities are much less than those conducted by General Motors. However, the reason for this is that the taxpayer's local business is on a much smaller scale. In proportion to the size of its operation, the taxpayer's local activities are, in every sense, equally as important as General Motors in gaining and holding its share of the local market.

DECISION AND DISPOSITION:

The taxpayer's petitions are denied. Extension interest of $91.95 has been added to tax assessment 59849 which increases it to an amount due of $2,773.33. This is due and payable within 30 days from the date of this Determination.

DATED this 24th day of July, 1970.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE
s/ DON R. MCCUISTON, *Hearing Officer*

[Letterhead omitted in printing]

Law Offices
Horswill, Keller, Rohrback,
Waldo & Moren
1220 IBM Building
Seattle, Washington 98101

FINAL
DETERMINATION

No. 70-67A

Attention: Mr. Robert K. Keller

Re: Standard Pressed
Steel Company
Registration No.
P409 011 840
Tax Assessment
59849

Gentlemen:

Your petitions dated August 5, 1970 and October 13, 1970, appealing Determination 70-67, have been received. In that Determination it was concluded that the taxpayer had established sufficient nexus in this state to support the assertion of the business and occupation tax on gross sales delivered from an out-of-state point. The facts are fully set out in the Determination and we reiterate only the following salient points: One resident employee engineer is maintained here for the purpose of consulting primarily with The Boeing Company regarding future requirements for aerospace fasteners and to settle any problems arising with this hardware after delivery. This product specialist operates out of his home at Federal Way, Washington and while he does not directly participate in the mechanics of completing the sales, information he gathers and his product recommendations contribute greatly to the taxpayer's ability to compete for this local business.

You contend that the impact of the business and occupation tax on the taxpayer's gross Washington sales creates an unconsitutional burden on interstate commerce. You also

point out that the local activities considered by the United States Supreme Court in *Norton Company v. Department of Revenue of Illinois,* 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377, and *General Motors Corporation v. Washington,* 377 U.S. 436, 12 L. Ed. 430, 84 S. Ct. 1564, were much greater than those present here. You make the further point that the Norton Company maintained a branch office and warehouse in Illinois as well as a group of engineers (whether in Illiniois or not is not known) who stood ready to give technical advice, and that the Court still exempted the Illinois business and occupation tax on direct sales from Massachusetts.

We have given this matter careful consideration and have concluded that Determination 70-67 correctly sets out the position of the Department of Revenue. We are convinced that the local activities of the resident employee engineer are indispensable constributions to the taxpayer's ability to gain and hold a share of the Washington market. We think the maintenance of an employee in this state for this purpose constitutes a local business location *which contributes directly* to the sales upon which the business and occupation tax is imposed. In our opinion, this is sufficient nexus to remove any possibility of an unconstitutional burden on interstate commerce.

We think further that the Norton and General Motors cases involve distinctions without any real differences. The Norton Company maintained a branch office and warehouse in Illinois and a group of engineers (either in Illinois or Massachusetts) who stood ready to give technical advice; yet the court exempted direct sales from Massachusetts. The reason for this, with which, incidentally, we

are in complete agreement, was that unlike the taxpayer's situation, none of Norton's facilities in Illiniois or its engineers actually participated in, or contributed to, such direct sales. Further, we can attach no significance to the fact that the degree of local activity conducted by both companies was much greater than that engaged in by the taxpayer. Obviously, the primary reason for this is that both Norton Company and General Motors deal with far larger segments of their respective local markets than does the taxpayer. In other words, this is really a question of proportion and not of comparable activities. In our opinion the local activities of the taxpayer's employee engineer are, in every sense, as equally important to its ability to gain and hold its share of the Washington market as the hierarchy of activities performed here by General Motors.

Since the United States Supreme Court's decision in the General Motors case is the most recent decision in this area, it is the most authoritative indication we have of the Court's attitude regarding the imposition of state excises on gross sales resulting from local activities performed by a resident employee engineer. We are convinced that the rationale of this decision supports the business and occupation tax here in question and your appeal is therefore, denied in full. This decision does not in any way jeopardize your right to further review of your protest. An appeal from this Determination may be taken to the Tax Appeals Board which will review it on an independent and impartial basis. If you wish, the matter can be heard informally. Mandatory extension interest of $131.36 has been added to the balance due under tax assessment 59489 which increases it to a total current amount due of $2,758.58. The due date for payment of this amount has been set at thirty

days from the date of this letter. If you wish to follow this appeal procedure, a petition for hearing must be directed to State of Washington, Tax Appeals Board, 1017 Cherry Street, Olympia, Washington, 98501, within this time.

Yours very truly,

STATE OF WASHINGTON
DEPARTMENT OF REVENUE

s/ JAMES R. STANFORD
Assistant Director

JRS: cc
cc: Standard Pressed Steel Company

STATE OF WASHINGTON
Board of Tax Appeals

STANDARD PRESSED STEEL COMPANY, *Appellant,* v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, *Respondent.*	Docket No. 70-41 Re: Excise Tax Appeal ORDER FINAL DECISION

This matter came on as a formal appeal for hearing on the 23rd day of April, 1971, before the Board of Tax Appeals; appellant being represented by Robert K. Keller, Counsel; and respondent being represented by Michael D. Hansen, Assistant Attorney General; the Board having heard and considered the arguments made on behalf of both parties, the Board now makes its findings and decision and issues its order as follows:

TAX IN CONTROVERSY

Tax Under Appeal	Period Covered
Wholesaling Business and Occupation Tax	1/1/65 - 6/30/69

OPINIONS AND FINDINGS OF FACT

The facts concerned in this appeal were not disputed and were presented to this Board at the hearing substantially in the form of an oral stipulation. In dispute is the application of this state's Business and Occupation Tax laws to these facts. Specifically the appellant contends its activities are exempt as being conducted in interstate commerce. The respondent contends the appellant's activities are sufficiently intrastate in nature to come within this state's taxing jurisdiction.

The appellant's home office is located in Jenkintown, Pennsylvania where it has one of its manufacturing plants. Its other manufacturing plant is located in Santa Ana, California. It manufactures industrial and aerospace fasteners. Its principal customer in Washington is The Boeing Company in Seattle until February 11, 1966, the appellant maintains a sales office in Seattle. The appellant has a few other customers in Seattle and its arrangements with these customers are conducted in the same manner as with The Boeing Company will be applicable also to these other customers.

Until February 11, 1966, the appellant maintained a sales office in Seattle. Subsequent to that date the appellant has had only one employee in this state, Mr. Robert H. Martinson, a Washington resident who has operated out of his home in Federal Way, Washington, near Seattle. Mr. Martinson's primary duty as an engineer is to consult with The Boeing Company personnel regarding the company's anticipated needs and requirements for aerospace fasteners as well as to discuss any difficulties which might develop with the appellant's product after delivery. The information regarding future requirements for fasteners, as well as information regarding any product difficulties which he is unable to reconcile, is forwarded by Mr. Martinson to either Jenkintown or Santa Ana for action by the appellant. Information gathered by Mr. Martinson concerning The Boeing Company's future needs is used by the appellant to determine if it should attempt to qualify for the business. If it does, a sample of its proposed product is sent directly to Boeing and, if accepted, shipment of the product is made by common carrier from an out-of-state point directly to The Boeing Company. Preliminary price and delivery data as well as orders and payments all run

directly between The Boeing Company and the appellant with no action required by Mr. Martinson. For purposes of information, Mr. Martinson does receive copies of the sales invoices issued by the appellant to customers Mr. Martinson has had contact with.

It was brought out in evidence that in addition to the customer contact made by Mr. Martinson, a group of the appellant's engineers visited The Boeing Company for about three days each six weeks. Mr. Martinson made arrangements with Boeing personnel for meetings with the engineer groups during their stays in Seattle. The engineers augmented and enlarged on the consulting and engineering work performed by Mr. Martinson and further permitted the appellant to meet the needs of The Boeing Company.

It was brought out that Mr. Martinson's supervisor was the appellant's sales manager located in Jenkintown, Pennsylvania. It was brought out that at times Mr. Martinson forwarded material to Jenkintown to be typed and mailed to customers. Mr. Martinson did not list his home phone in the appellant's name, but he did furnish his home phone number to Boeing personnel for more direct communication at various hours. Mr. Martinson did maintain a telephone answering service listed in the appellant's name. Messages from this service were relayed to Mr. Martinson for response and action. The bills for this service were sent directly to Jenkintown for payment.

Mr. Martinson by deposition stated he maintained an office location in his home consisting of a desk, file and a telephone on the desk, even though the number was listed in his own name. Mr. Martinson stated he took a deduction

on his income tax return for the use of his home as an office.

In issue is whether the activities of Mr. Martinson on the appellant's behalf and the position maintained for the appellant in Seattle by Mr. Martinson are sufficient to justify the respondent's imposition of Washington's Business and Occupation Tax. In our opinion they are.

We find the situation in this appeal to be very much like that in the case of *General Motors Corp. v. Washington,* 377 U.S. 436 (1964), except for the size of the corporate taxpayers and the volume of the taxpayers' activities in this state. We find also that the U.S. Supreme Court recently denied Certiori in the somewhat similar New Jersey case of *Clairol, Incorporated v. Kingsley,* 270 Atlantic 2d 702 (1970).

The appellant has placed particular reliance in support of its position on the case of *Norton Company v. Department of Revenue of Illinois,* 340 U.S. 534 (1951). The court in its syllabus in that case stated:

> "When a foreign corporation has gone into a state to do local business by state permission and has submitted itself to the taxing power of the state, it can avoid taxation on some sales to persons in that state only by sustaining the burden of showing that particular transactions are disassociated from the local business and interestate in nature.
>
> "The only transactions here involved that are so clearly interstate in character that the state could not reasonably attribute their proceeds to the local business, are orders sent directly to its head office by customers and shipped directly to the customers from the head office; and such transactions are not subject to this tax."

The appellant in the present appeal points out that The Boeing Company's orders for the purchase of the appellant's products are sent directly to the appellant's manufacturing plants outside this state. The manufactured products are shipped into this state directly to Boeing by common carrier. The negotiations for the sales order, invoicing, and payment are handled directly between the appellant's out-of-state office and Boeing with no required action by Mr. Martinson. On the basis of these facts, the appellant considers the holding in the *Norton* case to be controlling.

In addition to these facts, we find the activities of Mr. Martinson operating on behalf of the appellant to be necessary in order that the appellant might:

1. Become aware of its products which The Boeing Company might be able to use.
2. Obtain the engineering design for such products.
3. Secure the testing of sample products to qualify the products for sale to The Boeing Company.
4. Resolve problems in the use of the products after receipt and use by The Boeing Company.
5. Obtain and retain good will and working rapport with Boeing personnel.
6. Secure and update lists of Boeing purchasing specialists or control buyers, and the commodities for which they were responsible, for the use of the invoicing personnel at the appellant's home office.

We find that these factors were a necessary and vital part in the appellant's ability to gain its market with The Boeing Company in this state in the first instance and to hold its market with Boeing in the second. We find that without these factors, secured through the person of Mr. Martinson, or by some other qualified agent or agency of the appellant in this state, it is very unlikely the appellant

could have secured and retained The Boeing Company as its customer. We find that Mr. Martinson's activities, although not directly concerned with the writing of a sales order, the making of delivery, or the procurement of payment, constituted all the activities of selling necessarily preliminary to the writing of the orders. We find the sales activities of Mr. Martnison to be of such importance that the writing of the orders and subsequent activities of delivery and payment are only the end result of his intensive and extensive activities and the activities of the visiting groups of appellant's engineers in this state.

We cannot find that the acts of the purchaser mailing its orders to the appellant's out of state address and making payment to that address, and the shipment of the appellant's products by common carrier direct to the purchaser can be so divorced from the appellant's other corporate sales activities conducted in this state by Mr. Martinson and the other engineers to create an aura of immunity around the appellant's total operation exempting it from this state's taxing jurisdiction.

We believe the following from the text of the *General Motors* case, written in 1964 (The *Norton* case was written in 1951), illustrates the factual similarity between the facts in that case and the facts surrounding Mr. Martinson's activities in this appeal:

> "The district managers lived within the State of Washington and their jobs were 'the maintenance of a quality organization—dealer organization—and the follow-through and administration of programs, plans and procedures within their district, that will help to develop the dealer organization, for the best possible financial and sales results.' R. 109. While he had no office within the State, the district manager operated from his home where he received mail and telephone calls and otherwise carried on the corporation's business. He called upon each dealer in his district on an average of at least once a month, and often saw the larger dealers weekly."

In addition to the activities of the resident district managers, General Motors out-of-state zone manager, service manager and used car manager (living and headquartered in Portland, Oregon) made periodic visits to Washington dealers in a supervisory and advisory capacity. Their activities generally were comparative to the appellant's groups of out-of-state engineers that made periodic visits to The Boeing Company.

Except for the obvious difference in the size and volume of the business and activities conducted by General Motors as compared to that of the appellant, we believe the factual situations are quite parallel. We find the U.S. Supreme Court's opinion in the *General Motors* case was compatible with and did not overturn the court's decision in the *Norton* case. The court in its several syllabi in the *General Motors* case stated:

> "1. Though interstate commerce cannot be subjected to the burdens of multiple taxation, a tax measured by gross receipts is constitutionally proper if fairly apportioned.
>
> "2. The burden of establishing exemption from a tax rests upon a taxpayer claiming immunity therefrom. *Norton Co. v. Department of Revenue*, 340 U.S. 534, followed.
>
> "3. The bundle of appellant's corporate activities or 'incidents' in Washington afforded the State a proper basis for imposing a tax.
>
> "4. The evidence was sufficient to warrant the finding by the state court of a nexus between appellant's in-state activities and its sales there, especially where its

taxable business was so enmeshed with what it claimed was nontaxable.

"5. This Court does not pass upon appellant's claim of 'multiple taxation' in violation of the Commerce Clause because appellant did not show what definite burden in a constitutional sense the St. Louis tax places on the identical interstate shipments by which Washington measures its tax or that Oregon levies any tax on appellant's activity bearing on Washington sales."

In the present appeal this Board likewise does not pass on an issue of "multiple taxation" because no showing was made by the appellant that a definite burden was placed upon it as a result of the taxation exerted by the respondent.

In our opinion the holding of the U.S. Supreme Court in the *General Motors* case cited herein is controlling with respect to the factual situation presented to this Board in this appeal.

In addition to considering the issues and facts in this appeal, as noted above, we make the following specific findings of fact and conclusions of law.

FINDINGS OF FACT

1. The appellant corporation, Standard Pressed Steel Company, headquartered in Jenkintown, Pennsylvania, made sales of its manufactured products to customers, principally The Boeing Company, located in Seattle, Washington.

2. Its resident sales engineer, Mr. Martinson, operating from his home located in Federal Way, Washington, maintained close and continuous contact with The Boeing Company personnel.

3. The purpose of Mr. Martinson's activities, as the appellant's employee, was to secure and maintain the appellant's market for its products with The Boeing Company, the appellant's customer.

4. Mr. Martinson, with the aid of groups of the appellant's engineers who made periodic visits to The Beoing Company, accomplished this objective, although not being directly concerned with the writing of purchase orders, delivery of the products, or collection of payment.

5. The instate activities of Mr. Martinson and of the visiting engineer groups were so enmeshed with the total of the appellant's sales activity with The Boeing Company, they cannot be excluded from consideration with respect to the question of whether the appellant's sales were exempt under the Commerce Clause of the U.S. Constitution.

6. The evidence presented was sufficient to warrant the respondent's assessment of Business and Occupation Tax upon the appellant's sales concerned in this appeal.

CONCLUSIONS OF LAW

1. The evidence presented was sufficient to warrant the finding by respondent of the necessary minimum contact between the appellant's in-state activities and its sales in this state upon which to base its jurisdiction for the assessment of Business and Occupation Tax.

2. The decision of the U.S. Supreme Court in the case of *General Motors Corp. v. Washington*, 377 U.S. 436, supports the assessment made by the respondent.

3. The recent refusal of the U.S. Supreme Court to grant Certiori in the case of *Clairol, Incorporated v. Kingsley*,

270 Atlantic 2d 702, indicates the court's continuing consistent holding.

4. The holding of the U.S. Supreme Court in the case of *Norton Company v. Department of Revenue of Illinois*, 340 U.S. 535, does not contravene the court's holding in the *General Motors* case nor this Board's decision in this appeal.

DECISION

Having analyzed and considered the several issues raised, we conclude that the respondent's assessment of tax in issue in this appeal is proper and we hereby order that the same be sustained.

Dated at Olympia, Washington
this 26th day of May, 1971

s/ R. H. SINGER
Executive Secretary

STATE OF WASHINGTON
BOARD OF TAX APPEALS

s/ROBERT I. TENNEY
Chairman

s/ J. JAY WILLIAMS
Member

[Affidavit of Service omitted in printing.]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

STANDARD PRESSED STEEL COMPANY, *Petitioner,* v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, *Respondent.*	No. 44750 PETITION FOR JUDICIAL REVIEW

COMES NOW Standard Pressed Steel Company, Petitioner herein, and, pursuant to RCW 34.04.130, respectively shows the court:

I

That petitioner was the Appellant in a contested proceeding for cancellation and abatement of $2,909.35 in Business and Occupation taxes assessed against petitioner and refund of $30,535.56 in Business and Occupation taxes paid to the Department of Revenue, State of Washington, on the ground that petitioner was and is not liable for payment of Business and Occupation taxes pursuant to the Constitution of the United States of America and the State of Washington, said proceeding being identified as Standard Pressed Steel Company, Appellant vs. State of Washington Department of Revenue, Respondent, Docket No. 70-41, Excise Tax Appeal before the State of Washington Board of Tax Appeals.

II

That a Hearing in said proceedings was held by said Board on April 23, 1971.

IV

That on May 26, 1971, said Board entered a Decision in said proceeding. That a true and correct copy of said Decision is attached hereto, marked Exhibit A, and is hereby incorporated herein by reference.

V

That said Board's decision of May 26, 1971, has prejudiced petitioner's substantive rights and petitioner is aggrieved thereby.

VI

That petitioner has paid the $2,909.35 interest and tax assessment as required by RCW 82.03.180 to the Department of Revenue and the amount sought by way of refund herein is therefore $33,444.91 plus interest.

VII

That petitioner hereby petitions the above-entitled court for a review of said Decision entered by said Board on May 26, 1971, and respectfully shows the court:

That the said Decision of said Board is in violation of the Constitution of the United States Government and the State of Washington in that the Business and Occupation taxes herein constitute an unlawful interference with interstate commerce.

WHEREFORE, petitioner prays:

1. That this court proceed to review said decision of said Board in the manner provided in RCW 34.04.130;

2. That this court reverse said decision of said Board and to grant petitioner judgment against the State of Washington Department of Revenue in the amount of $33,444.91 plus interest and costs.

3. That the court grant such other and further relief as it may deem proper.

s/ ROBERT K. KELLER

Robert K. Keller, Attorney for Standard Pressed Steel Company, Petitioner

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

STANDARD PRESSED STEEL COMPANY, *Appellant*, v. DEPARTMENT OF REVENUE, *Respondent*.	No. 44750 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER coming on regularly for hearing before the above-entitled court on the 16th day of June, 1972, and the appellant appearing by and through its attorney, Kenneth L. Cornell, of the law firm of Horswill, Keller, Rohrback, Waldo & Moren, and the respondent appearing by and through its attorneys, SLADE GORTON, Attorney General for the State of Washington, and William D. Dexter, Assistant Attorney General, and the court considering the evidence and the arguments of respective counsel, now, therefore, the above-entitled court makes the following:

FINDINGS OF FACT

I

That at all times herein material, Standard Pressed Steel Co., appellant herein, conducted business activities as a foreign corporation within the state of Washington.

II

That the activities carried on by appellant in the state of Washington have not been established as disassociated from the gross receipts derived by appellant from the sales in question to the Boeing Company.

III

That the appellant employed a full time resident agent within the state of Washington to conduct activities with the Boeing Company which activities were carried on in part by appellant's employee out of his residence in Washington as an office, and which activities were instrumental in appellant establishing and maintaining Boeing as its customer for the sales giving rise to the gross receipts in question.

IV

That it was necessary that appellant have its employee Mr. Martinson in the state of Washington so that the appellant could: (1) become aware of which of its products the Boeing Company might be able to use; (2) secure the testing of sample products to qualify the products for sale to the Boeing Company; (3) obtain the engineering designs for such products; (4) resolve problems in the use of the products after receipt and use by Boeing Company; (5) obtain and retain goodwill and working rapport with Boeing personnel, and (6) secure and update lists of Boeing purchasing specialists or control buyers and the commodities for which they are responsible for the use of the invoicing personnel at the appellant's home office.

V

That the purpose of the appellant's activities in the state of Washington was to provide sufficient facts to the appellant to enable it to make Washington sales to the Boeing Company in the state of Washington.

CONCLUSIONS OF LAW

I

That the appellant conducted sufficient intrastate activity for imposition of the Washington business and occupation tax on authority of *General Motors Corp. v. State*, 60 Wn.2d 862, 376 P.2d 843 (1962), aff'd 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964).

II

That while no one single aspect of appellant's activity can itself be determinative of doing business in this state for business and occupation tax purposes, each activity must be considered in conjunction with other activities to determine whether the cumulative effect of any one activity coupled with all other activities is instrumental in the appellant's establishing and holding its Washington market for the sale of its products.

III

That the appellant has the burden of proving under *General Motors Corp. v. State*, 377 U.S. 436, 12 L. Ed. 2d 438, 84 S. Ct. 1564 (1964), and *Norton Co. v. Dept. of Revenue*, 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377 (1951), that its intrastate activities in this state were disassociated from the gross receipts it derived from sales to the Boeing Company in Washington.

IV

That the effect of the activities involved in establishing and holding Washington as a market for the appellant's sales in question and not the form of the operation nor the quantity of the operation in Washington controls in determining Washington's jurisdiction to impose its business and occupation tax upon appellant's activities in Washington measured by its Washington gross receipts.

V

That it is not necessary that appellant's Washington instate activities be denoted "sales" activities so long as the activities cannot be disassociated from appellant's Washington sales.

DONE IN OPEN COURT This 10th day of October, 1972.

s/ FRANK E. BAKER
Judge

Presented by:

s/WILLIAM D. DEXTER

William D. Dexter
Assistant Attorney General
415 General Administration Bldg.
Olympia, Washington 98504
Telephone: (206) 753-5515
Attorney for Respondent

Approved as to form and Notice of Presentation waived:

HORSWILL, KELLER, ROHRBACK, WALDO & MOREN

By.....
Attorneys for Appellant

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

STANDARD PRESSED STEEL CO., *Appellant,* v. DEPARTMENT OF REVENUE, *Respondent.*	No. 44750 JUDGMENT

THIS MATTER Coming on regularly for hearing before the above-entitled court on the 16th day of June, 1972, and the appellant appearing by and through its attorney, Kenneth L. Cornell, of the law firm of Horswill, Keller, Rohrback, Waldo & Moren, and the respondent appearing by and through its attorneys Slade Gorton, Attorney General for the State of Washington, and William D. Dexter, Assistant Attorney General, and the court having made its findings of fact and conclusions of law, now, therefore, it is hereby

ORDERED, ADJUDGED and DECREED That the appellant conducted sufficient intrastate activity for imposition of the Washington business and occupation tax on authority of *General Motors Corp. v. State,* 60 Wn.2d 862, 376 P.2d 843 (1962), aff'd 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964).

It is futher ORDERED, ADJUDGED and DECREED That the final decision of the State of Washington Board of Tax Appeals in Docket No. 70-41 is affirmed.

IT IS FURTHER ORDERED, ADJUDGED and DECREED That the refund requested by the petitioner in its petition for judicial review is denied and that petitioner take naught by this suit.

It is further ORDERED, ADJUDGED and DECREED That respondent is entitled to recover its costs and disbursements herein to be taxed.

DONE IN OPEN COURT This 10th day of October, 1972.

s/ FRANK E. BAKER
Judge

Presented by:

s/ WILLIAM D. DEXTER

William D. Dexter
Assistant Attorney General
415 General Administration Bldg.
Olympia, Washington 98504
Telephone: (206) 753-5515
Attorney for Respondent

Approved as to Form and Notice of Presentation Waived:

HORSWILL, KELLER, ROHRBACK, WALDO & MOREN

By.....
Attorneys for Appellant

[Affidavit of Service omitted in printing]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

STANDARD PRESSED STEEL CO., *Appellant,* v. DEPARTMENT OF REVENUE, *Respondent.*	No. 44750 NOTICE OF APPEAL

TO: DEPARTMENT OF REVENUE, STATE OF WASHINGTON, Respondent, and Slade Gorton, Attorney General, and William D. Dexter, Assistant Attorney General, its attorneys

AND TO: The Clerk of the Above-entitled Court

YOU AND EACH OF YOU are hereby notified that appellant being aggrieved by reason of the judgment entered in this cause against appellant on the 10th day of October, 1972, does hereby appeal to the Supreme Court of the State of Washington from that certain judgment made, rendered and entered in this court and cause on the 10th day of October, 1972, and from each and every part of said judgment of said Superior Court, and from all rulings and orders, including Findings of Fact and Conclusions of Law, adverse to the appellant which occured during the trial of this case and prior and subsequent to the entry of said judgment. One of the contentions of appellant on appeal is that the case involves the question that the imposition of a tax is invalid on the ground of repugnancy to the Constitution of the United States and of the State of Washington.

DATED this 10th day of October, 1972.

KENNETH L. CORNELL
Of Keller, Rohrback, Waldo, Moren & Hiscock
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STANDARD PRESSED STEEL COMPANY, *Appellant,* v. DEPARTMENT OF REVENUE, STATE OF WASHINGTON, *Respondent.*	No. 1022-II Division Two Filed Dec. 3, 1973

ARMSTRONG, J.—This is an appeal from a Superior Court judgment affirming the final decision of the Board of Tax Appeals upholding the imposition of this state's business and occupation tax upon plaintiff, Standard Pressed Steel Company. It was the contention of plaintiff that imposition of the tax was unconstitutional. We hold that levying of the tax was constitutionally permissible.

The hearings below before both the Board of Tax Appeals and the trial court were conducted on the basis of the deposition of H. Robert Martinson, an employee of plaintiff, various exhibits introduced in connection with the deposition, and the pleadings in the case. There was no "live testimony." For this reason, it is unnecessary for us to consider the five findings of fact assigned as error by the plaintiff, because we may approach review of the plaintiff's contentions as indicated by the Supreme Court in *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969), quoting with approval the following language from *Carlson v. Bellevue*, 73 Wn.2d 41, 48, 435 P.2d 957 (1968):

> The appeal, therefore, from the trial court's judgment brings before us, in the same form and content, the identical documents and records presented to the trial court. Under these circumstances, we are not bound by disputed findings of the trial court to the same extent and in the same manner as where the trial

> court's findings rest upon the oral testimony of witnesses. . . . We are entitled to make our own examination of the records thus presented and determine the merits of the contentions going to the issue of arbitrary, capricious, and unreasonable legislative action. (Citations omitted)

In other words, this court on appeal stands in the same position as the trial court in looking at the facts of the case and should review the record de novo. *Anderson v. Island County*, 81 Wn.2d 312, 316, 501 P.2d 594 (1972).

Both *Anderson* and *Smith* were zoning cases and the standard of judicial review was whether there had been arbitrary, capricious, and unreasonable legislative action. In this case, the scope of judicial review is pursuant to the Administrative Procedures Act and limited by the provisions of RCW 34.04.130(6).[1] Our review here is to determine from the facts whether the Board of Tax Appeals' decision sustaining imposition of the business and occupation tax was in violation of constitutional provisions.

The record discloses that plaintiff, Standard Pressed Steel Company, is a foreign corporation with production facilities located in Jenkintown, Pennsylvania and Santa Ana, California. A significant amount of plaintiff's business involves the manufacture and sale of fasteners (nuts and

1. RCW 34.04.130(6) provides: "(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
(a) in violation of constitutional provisions; or
(b) in excess of the statutory authority or jurisdiction of the agency; or
(c) made upon unlawful procedure; or
(d) affected by other error of law; or
(e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or
(f) arbitrary or capricious."

bolts, generally) to be used in the aerospace industry, and plaintiff's principal customer in this state during the tax years in question was the Boeing Company in Seattle.

The only employee of Standard Pressed Steel present within the State of Washington over the tax years in question was H. Robert Martinson, a "sales engineer." Martinson performed his activities for Standard Pressed Steel out of a portion of a room in his home equipped with a desk, telephone, and a file cabinet.

Martinson's primary function was to work with Boeing's engineers in the initial phases of aerospace design and construction, and through contact with Boeing engineers inform himself of possible prospective needs of the Boeing Company, and its various subcontractors, for aerospace fasteners. He would then initiate a product engineering request describing in detail the specifications required by Boeing and send this information on to plaintiff's out-of-state offices. After receiving this information from Martinson, plaintiff would make a decision as to whether or not Standard Pressed Steel would attempt to "qualify" as a Boeing supplier of a particular fastener; that is, Boeing determined who could be a supplier of component parts by qualification tests done at their Seattle facilities. If plaintiff should decide to attempt to qualify as a supplier, the company would manufacture sample qualification pieces and forward these to Boeing for qualification tests. If the fasteners met the required specifications, Standard Pressed Steel would become an "approved source" and the Boeing Company would then enter into negotiations with plaintiff's out-of-state offices for purchase of the fasteners.

The record reflects that all such dealings and negotiations

between Boeing and Standard Pressed Steel were carried on directly between Boeing and plaintiff's out-of-state offices. Martinson was bypassed completely, except to the extent that he periodically informed plaintiff of the various subcontractors, purchasing specialists, and control buyers of commodities for which Standard Pressed Steel was an approved source. Martinson had nothing to do with quoting prices, delivery dates, receiving, soliciting, accepting orders, handling shipments, or approving credit. No inventories were kept in this state, and all deliveries were made by plaintiff directly through a common carrier.

The above qualification process consumed approximately 80 to 90 percent of Martinson's time, with the remainder devoted to "trouble-shooting." If Boeing experienced any problems in their use of the fasteners supplied by the plaintiff, Martinson's duties were to relay this information to plaintiff's engineers at the out-of-state offices, and there the engineers would work to resolve any difficulties with the product in their laboratories. The engineers would then forward their solution to Martinson, who would present the proposed solution to Boeing's engineers in Seattle. In addition, approximately three days every six weeks Martinson would set up meetings between Boeing engineers and visiting groups of plaintiff's engineers to visit and discuss engineering problems.

Based on the above activity within the State of Washington, the state contends that Standard Pressed Steel Company is subject to the business and occupation tax measured by gross receipt from plaintiff's sales to the Boeing Company.

In assessing the constitutionality of imposing the business and occupation tax in this case, we may start with the undisputed proposition that a state may not tax the privilege of engaging in interstate commerce, but may impose a tax that is incident upon an activity that is peculiarly local and distinct from interstate commerce. *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 430, 438, 84 S. Ct. 1564 (1964); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 82 L. Ed. 823, 58 S. Ct. 546 (1938). In other words, a state *does* have the right to tax the privilege of doing *local* business, and if there is a taxable incident within the jurisdiction, the tax does not offend the commerce clause of the constitution as a tax on the privilege of doing interstate business. *Greyhound Lines, Inc. v. Tacoma*, 81 Wn.2d 525, 527, 503 P.2d 117 (1972); *Rena-Ware Distrib. Inc. v. State*, 77 Wn.2d 514, 519, 463 P.2d 622 (1970).

Here the record clearly discloses that Standard Pressed Steel Company employed Mr. Martinson as a resident agent within this state to conduct business activities with the Boeing Company, in part out of his Washington residence as an office, so that Standard Pressed Steel could: (1) become aware of which of its products the Boeing Company might be able to use; (2) secure the testing of sample products to qualify the products for sale to the Boeing Company; (3) obtain the engineering designs for such products; (4) resolve problems in the use of the products after receipt and use by the Boeing Company; (5) obtain and retain goodwill and working rapport with Boeing personnel; and (6) secure and update lists of Boeing purchasing specialists or control buyers, and the commodities for which they are responsible, for the use of the personnel at the plaintiff's home office.

We are of the opinion that the foregoing substantial services constituted a sufficient peculiarly local and distinct taxable incident within the State of Washington such that imposition of the business and occupation tax was not on the privilege of engaging in interstate commerce, but rather on the privilege of doing local business.

Our inquiry does not end here, however, for even when there is a peculiarly local activity, the measure of the tax must be reasonably related to those local incidents. *General Motors Corp. v. Washington, supra.* A tax measured by gross receipts from sales by a foreign corporation to customers within the state must be closely related to the local activities of the corporation, for due process requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. v. Maryland,* 347 U.S. 340, 345, 98 L. Ed. 744, 74 S. Ct. 535 (1954).

It might be argued that since gross receipts from plaintiff's sales to the Boeing Company represent extensive manufacturing and operational activities in Pennsylvania and California, such gross receipts are not fairly related to the activities of Mr. Martinson. However, this contention was discussed in *Dravo Corp. v. Tacoma,* 80 Wn.2d 590, 599, 496 P.2d 504 (1972), as follows:

> The fact that the value which the gross receipts measure is, in large part, the result of activity *outside* the territorial limits of the taxing jurisdiction does not mean the gross receipts are not fairly related to the activity *within* the jurisdiction. There is no constitutional objection to resorting to extraterritorial elements in determining the *measure* of a tax. *General Motors Corp. v. State,* 60 Wn.2d 862, 874, 376 P.2d 843 (1962), *aff'd,* in *General Motors Corp. v. Washington, supra*; *Wisconsin v. J.C. Penney Co., supra* at 445, *rehearing denied,* 312 U.S. 712, 85 L. Ed. 1143, 61 S. Ct. 444 (1941); *Great Atl. & Pac. Tea Co. v. Grosjean,* 301 U.S. 412, 425, 81 L. Ed. 1193, 57 S. Ct. 772, 112 A.L.R. 293 (1937).

Plaintiff relies on *Norton Co. v. Department of Revenue,* 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377 (1951), in support of the contention that Standard Pressed Steel's sales to the Boeing Company were not sufficiently related to Mr. Martinson's activities to justify the tax. In that case, the Norton Company was a Massachusetts corporation that manufactured and sold abrasive machines. It sought a refund for taxes paid under the provisions of Illinois' occupation tax. The Norton Company had no salesmen within Illinois, but it did maintain an office and warehouse in Chicago where it kept a substantial inventory. The company also had a group of engineers available to supply engineering and technical advice.

The United States Supreme Court upheld the tax where the measure of the tax attributed to the Chicago branch income from all sales that utilized it either in receiving orders or distributing goods. The court noted that the taxpayer had not established that such services as were rendered by the Chicago office were not decisive factors in holding that market. On the other hand, the court held that proceeds from orders sent directly to Massachusetts by the customer and shipped directly to the customer from Massachusetts were not reasonably attributable to the local business, and therefore not subject to the Illinois tax. *Norton Co. v. Department of Revenue, supra.*

From this holding plaintiff argues that since the presence of consulting engineers in Illinois was not enough to justify

the tax on the interstate items in *Norton*, the activities of Mr. Martinson should not sustain the tax on sales made directly between Boeing and plaintiff's out-of-state offices in this case.

However, plaintiff overlooks the fact that implicit in the *Norton* decision was the conclusion that the activities of the the local Chicago office, including the activities of the engineers, were not decisive factors in holding or establishing the market reflected by the direct, interstate sales. For example, the Norton decision was construed by our State Supreme Court as follows: "We only interpret the *Norton Co.* case as holding that such a tax may not be levied upon the proceeds from sales with which the local outlet had nothing to do." *B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 675, 231 P.2d 325 (1951).

We are satisfied that the local activities of Mr. Martinson were instrumental in establishing and maintaining the Boeing Company as a market for the sales giving rise to the proceeds by which the state seeks to measure this tax. We therefore conclude that because the gross receipts from plaintiff's sales to the Boeing Company were reasonably related to the local incidents of the tax, imposition of the business and occupation tax here was not offensive to due process.

Plaintiff contends that the state's imposition of the business and occupation tax creates a multiple burden of taxation on plaintiff's interstate commerce. It is of course true that in judging the state's power to levy a tax measured by activities connected with interstate commerce, the following determinations represent guidelines presently employed:

> (1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage when competing locally; ***the discrimination test.*** (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; ***the multiple burden test.***

McKinnis Travel Service v. State, 78 Wn.2d 229, 232, 472 P.2d 392 (1970); *Public Utility Dist. No. 2 of Grant County v. State*, 82 Wn.2d 232, 237, 510 P.2d 206 (1973).

In this case no argument has been advanced that discrimination against interstate commerce exists; nor could it be so argued, since this tax applies to all "businesses" in the State of Washington whether they engage in interstate commerce, intrastate commerce, or both. *McKinnis Travel Service v. State, supra.* As to the contention that the tax creates a multiple burden, we note that the United States Supreme Court, as well as the Supreme Court of this state, has held that the burden is upon the taxpayer to affirmatively show that its activities are subject to taxation elsewhere. *General Motors Corp. v. Washington, supra*; *Washington-Oregon Shippers Cooperative Ass'n. v. Schumacher*, 59 Wn.2d 159, 367 P.2d 112 (1961). In this case we find no such affirmative showing other than the unsupported assertion in plaintiff's appellate brief that a multiple burden has been created.

For the foregoing reasons, we find no constitutional infirmities derived from either the due process or commerce clauses to preclude the state from levying a tax upon the local activities of Standard Pressed Steel Company. Further, it was constitutionally permissible to measure that tax by the value of gross receipts from sales to the Boeing

Company's facilities in this state. We therefore sustain the imposition of the business and occupation tax in this case.

Affirmed.

We concur:

PEARSON, C. J.

PETRIE, J.

ARMSTRONG, J.

[Affidavit of Service omitted in printing]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STANDARD PRESSED STEEL COMPANY, *Appellant*, v. DEPARTMENT OF REVENUE, STATE OF WASHINGTON, *Respondent*.	No. 1022-II PETITION FOR REHEARING

Appellant, Standard Pressed Steel Company, in response to the opinion of this court filed on December 3, 1973, hereby petitions the court for a hearing of this case.

Petitioner respectfully alleges that the opinion of this court should be changed in the following respects:

1. Based on the holding of the United States Supreme Court in *Norton Co. v. Department of Revenue*, 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377 (1951), the activities performed by appellant's resident engineer were not decisive factors in holding or establishing the Washington market.

On page 5 of this court's opinion, the court stated that Martinson's services on behalf of appellant were sufficient to subject appellant to the state Business & Occupation Tax. The court further stated that *Norton* could be distinguished in that the Supreme Court concluded the activities of the Norton engineers were not decisive in holding the exempt "direct sales market", while this court concluded Martinson's activities were decisive factors in holding the Boeing "direct sales market".

What this court overlooked in its opinion is that *the activities of Martinson differed in no material respect from those activities and services performed by the Norton engineers on the exempt direct sales.* If the Supreme Court held that those activities were not decisive, similarly, Martinson's activities and services should also be held to be not decisive factors in holding or establishing the market.

2. Based on the *Norton* case, the six enumerated services listed by this court are not sufficient local incidents on which to impose the tax.

On page 5 of its opinion, this court listed six services which were said to be performed by Martinson on behalf of appellant. A review of the *Norton* decision shows that these enumerated services were basically those services performed by the Norton engineers, which the Supreme Court held were not sufficient local activities on which to impose the tax. For example, the Norton Co. engineers consulted with prospective customers as to their needs. This can be compared to Martinson's activities in becoming aware of products which the Boeing Co. might be able to use and securing the Boeing design drawings for such products. As far as securing the testing of sample products, the record shows that the decision to test was made by personnel in appellant's out-of-state plants, and in no way was involved in the qualification process (Martinson Dep. 14, 20). Both the Norton engineers and Martinson assisted in resolving problems experienced by the customer in the use of the product, and certainly, the Norton engineers were concerned with obtaining and retaining good will and working rapport with customers. Appellant submits

that based on the similarity of their activities, the *Norton* decision compels a holding that Martinson's activities were not sufficient local incidents on which to base taxation.

3. The Norton engineers did perform services on the exempt direct sales.

On page 8 of its opinion, this court stated that *Norton* held merely that a tax may not be levied upon proceeds from sales with which the local outlet had nothing to do, citing *B. F. Goodrich Co. v. State,* 34 Wn.2d 663 (1951). If by this statement, the court intends to say that the Norton engineers did not perform services on exempt sales, appellant respectfully submits the *Norton* case as not being read correctly. First of all, the *Norton* decision does not say that the local outlet performed no services in connection with the exempt sales. Further, there is nothing in the opinion to support the court's apparent conclusion that the engineers were, in fact, part of the Chicago outlet. On this point, the *Norton* opinion in defining the services of the Chicago outlet did not mention any engineering services being performed out of the Chicago office; therefore, even if the court should conclude that the local outlet had nothing to do with the exempt sales, that does not mean in turn that the Norton engineers were not performing services on those sales.

A careful reading of the *Norton* decision further shows that the only reasonable conclusion one could draw is that the engineers did perform their usual services in connection with the direct sales. (See appellant's reply brief, 2 thru 4).

DATED this 20th day of December, 1973.

s/ KENNETH L. CORNELL
Of Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STANDARD PRESSED STEEL COMPANY, *Appellant*, v. DEPARTMENT OF REVENUE, STATE OF WASHINGTON, *Respondent*.	No. 1022-II ORDER DENYING PETITION FOR REHEARING OR MODIFICATION

The court has considered this petition for rehearing or modification and has determined that it should be denied. Accordingly, it is

ORDERED that the petition is denied.
DATED this 3rd day of January, 1974.

VERNON R. PEARSON
Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STANDARD PRESSED STEEL CO., *Appellant*, v. DEPARTMENT OF REVENUE, *Respondent*.	No. 42593-1022-II PETITION FOR REVIEW

I
STATEMENT OF FACTS

Appellant, Standard Pressed Steel Co., is a foreign corporation with production facilities located in Jenkintown, Pennsylvania and Santa Ana, California. A significant amount of appellant's business involves the manufacture and sale of fasteners (nuts and bolts generally) to be used in the aerospace industry, and appellant's principal customer in this state during the tax years in question was The Boeing Company in Seattle.

The only employee of Standard Pressed Steel present within the State of Washington over the tax years in question was H. Robert Martinson. Martinson performed his activities for Standard Pressed Steel out of a portion of one room in his home equipped with a desk, telephone, and a file cabinet.

Martinson's primary function was to inform himself of possible prospective needs of The Boeing Company for aerospace fasteners through contact with Boeing engineers and its various subcontractors. Martinson would then relay this information to appellant's out-of-state offices on a form entitled "Product Engineering Request", which described in detail the Boeing specifications. After receiving

this information from Martinson, appellant would then make the decision as to whether or not Standard Pressed Steel would attempt to "qualify" as a Boeing supplier of a particular fastener; that is, Boeing determined who could be a supplier of component parts by qualification tests done by Boeing at its Seattle facilities. If appellant should decide to attempt to qualify as a supplier, the company would manufacture sample qualification pieces and forward these directly to Boeing for qualification tests. If the fasteners met the required specifications, Standard Pressed Steel would become an "approved source", and the Boeing Company would then enter into direct negotiations with appellant's out-of-state offices for purchase of the fasteners, which negotiations might or might not culminate in a sale.

Martinson was not consulted in any way either by Boeing or appellant's out-of-state offices in the qualification process and Martinson was not consulted by appellant in arriving at its decision as to whether or not to attempt to qualify. Martinson's only function in this entire process was to relay to appellant's out-of-state offices the information concerning Boeing's possible needs. From that point on, all dealings and negotiations were carried on directly between Boeing and appellant's out-of-state offices. Martinson was by-passed completely, except to the extent that he periodically informed the appellant of the identity of various subcontractors, purchasing specialists, and control buyers of commodities, for which Standard Pressed Steel was an approved source. Martinson had nothing to do with quoting prices, delivery dates, receiving, soliciting, accepting orders, handling shipments, or approving credit. No inventories were kept in this state, and all deliveries were made by appellant directly through a common carrier.

The above qualification process consumed approximately 80% to 90% of Martinson's time, with the remainder devoted to "troubleshooting". If Boeing experienced any problems in its use of the fasteners supplied by the appellant, Martinson's duties were to relay this information to appellant's engineers at the out-of-state offices, and there the engineers would work to resolve any difficulties with the product in their laboratories. The engineers would then forward their solution to Martinson, who would present the proposed solution to Boeing's engineers in Seattle. In addition, approximately three days every six weeks, Martinson would set up meetings between Boeing engineers and visiting groups of appellant's engineers to visit and discuss engineering problems.

Based on the above activitiy within the State of Washington, the state contends that Standard Pressed Steel Co. is subject to the Business & Occupation Tax measured by gross receipts from appellant's sales to The Boeing Company.

II

QUESTIONS OF LAW INVOLVED

1. Whether the assessment of the Business & Occupation Tax on appellant's gross sales to Boeing is a violation of the commerce clause of the federal constitution.

2. Whether the assessment of the Business & Occupation Tax on appellant is a violation of the due process clauses of the federal and state constitutions.

III

JURISDICTIONAL STATEMENT

A. *Introduction*: On December 3, 1973, the Washington Court of Appeals, Division II, filed its opinion in the above-

referenced appeal. On January 3, 1974, that same court denied appellant's petition for rehearing.

This court should assume jurisdiction, as (1) the opinion of the Court of Appeals is in conflict with *B. F. Goodrich Co. v. State*, 34 Wn.2d 663 (1951); *General Motors Corp. v. State*, 60 Wn.2d 862 (1962), aff'd. 377 U.S. 436, 84 S. Ct. 1564 (1964); *Norton Co. v. Dept. of Revenue*, 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377 (1951); and *McKinnis Travel Service v. State*, 78 Wn.2d 229 (1970); (2) the assessment of the Business and Occupation Tax on appellant violates the state and federal due process requirements and the commerce clause prohibition of the federal constitution, and (3) the opinion of the Court of Appeals below is a radical extension of the taxing power of the State of Washington, and the issues before this court affect many and numerous businesses besides appellant and affects the taxing powers of the state.

The presentation which follows will not discuss the above-stated reasons for jurisdiction separately, as they cannot properly be separated out for discussion. Rather, all of the above-stated reasons why this court should assume jurisdiction will be expanded on under one general heading of Statement of the Law.

B. *Statement of the Law*: In its opinion, the Court of Appeals held that appellant's activities constituted a sufficient, peculiarly local and distinct taxable incident within the State of Washington such that the imposition of the tax did not violate the interstate commerce limitations of the federal constitution, and that the measure of the tax was reasonably related to those local incidents so that due process was not violated. Appellant respectfully submits that

this holding is in conflict with the decisions of *Norton Co. v. Dept. of Revenue, supra, B. F. Goodrich Co. v. State, supra,* and *General Motors Corp. v. State, supra.*

The record in this case is clear that the only in-state activity of appellant consisted of Martinson's (1) consulting with Boeing as to its potential needs, and (2) offering a measure of technical engineering assistance and advice. Based on *Norton Co. v. Dept. of Revenue, supra,* the tax based on these activities is unconstitutional.

The facts in *Norton* show that the Norton Co. was a producer of industrial grinding wheels and abrasive materials used in manufacturing. The Norton Co. maintained a large sales office and warehouse in Chicago and made over the counter sales to customers, which the Norton Co. admitted were subject to the state Business & Occupation Tax. The Norton Co. did, however, challenge the imposition of the occupation tax measured by gross sales to Illinois customers on four different classes of sales, alleging in part that the in-state activities as to those sales were not sufficient to justify the tax. The Supreme Court held that as to three of these four classes of sales in question, the tax was proper and constitutional. As to sales resulting from direct orders being placed by customers with Norton's out-of-state offices, with the only in-state activity being that performed by Norton's resident, liaison engineers, the in-state activity of Norton's engineers was held not sufficient to justify the imposition of the tax.

It is clear from *Norton* that as to that class of sales to Illinois customers held to be non-taxable, such as exists in the present case, the only in-state activity associated with the sales in question was performed by resident, liaison

engineers. It is also clear that the services of the Norton Co.'s corps of liaison engineers were directly associated with those sales to Illinois customers held by the court to be non-taxable. It is also clear that the activities performed by the Norton Co. engineers are the same as those activities performed by appellant's resident engineer, that is, (1) consulting with customers as to their potential needs, and, (2) offering technical engineering assistance and advice. In *B. F. Goodrich Co. v. State, supra,* this court in discussing the *Norton* decision made the following observation:

> No salesmen were employed by the company in Illinois, *but it did have a group of engineers available to consult with prospective customers as to their needs.* These engineers did not solicit or take orders for goods. (Emphasis added). 34 Wn.2d at 670.

The Supreme Court in *Norton* further observed that these engineers in their consulting work offered technical and engineering assistance and advice to customers.

A review of the present records shows that Martinson's primary duties were the same as those of the Norton engineers. Clearly, on the authority of *Norton,* which was deemed to be controlling by this court in *B. F. Goodrich, supra,* the State of Washington cannot constitutionally subject appellant to the state Business & Occupation Tax. If an out-of-state company, with an extensive local sales office, cannot be taxed on its direct orders to the manufacturer, and the company maintains a corps of resident, liaison engineers to consult with the customers who ordered direct, clearly under the facts of the present case, where there is no local sales activity of any kind, and no local outlet, all sales being of the direct order type, appellant cannot constitutionally be subject to the Business & Occupation Tax.

The Court of Appeals below distinguished *Norton* on the basis that the Supreme Court in the *Norton* decision concluded that the activities of the Norton engineers were not decisive in holding the exempt "direct sales market", while the Court of Appeals concluded that Martinson's activities were decisive factors in holding the Boeing "direct sales market". What the court overlooked in this conclusion is that the activities of Martinson differed in no material respect from those activities and services performed by the Norton engineers on the exempt direct sales. The court below listed six services which were said to be performed by Martinson on behalf of appellant. A review of the *Norton* decision shows that these enumerated services were basically those services performed by the Norton engineers, which the Supreme Court held were not sufficient local activities on which to impose the tax. For example, the Norton Co. engineers consulted with prospective customers as to their needs. This can be compared to Martinson's activities in becoming aware of products which The Boeing Company might be able to use and securing the Boeing design drawings for such products. As far as securing the testing of sample products, the record shows that the decision to test was made by personnel in appellant's out-of-state plants in no way was Martinson involved in the qualification process. Both the Norton engineers and Martinson assisted in resolving problems experienced by the customer in the use of the product, and certainly, the Norton engineers were concerned with obtaining and retaining good will and working rapport with customers. Appellant submits that based on the similarity of their activities, the *Norton* decision compels a holding that Martinson's activities were not sufficient, local incidents on which to base taxation.

The court below further attempted to distinguish *Norton* by stating that *Norton* held merely that a tax may not be levied upon proceeds from sales with which the local outlet had nothing to do, citing *B. F. Goodrich Co. v. State*, 34 Wn.2d 663 (1951). If by this statement, the court intends to say that the Norton engineers did not perform services on exempt sales, appellant respectfully submits the *Norton* case is not being read correctly. First of all, the *Norton* decision does not say that the local outlet performed no services whatsoever in connection with the exempt sales. Further, there is nothing in the opinion to support the court's apparent conclusion that the engineers were, in fact, part of the Chicago outlet. On this point, the *Norton* opinion in defining the services of the Chicago retail outlet and warehouse did not mention any engineering services being performed out of the Chicago outlet; therefore, even if the court should conclude that the local outlet had nothing to do with the exempt sales, that does not mean in turn that the Norton engineers were not performing services on those sales. A careful reading of the *Norton* decision further shows that the only reasonable conclusion one can draw is that the engineers did perform their usual services in connection with the direct sales. Appellant relies on the following as conclusive on this point.

(1) The Washington Supreme Court in *B. F. Goodrich Co. v. State*, 38 Wn.2d 663, 670, 231 P.2d 325 (1951), stated that:

> No salesmen were employed by the company in Illinois, but it did have a group of engineers available to consult with prospective customers as to their needs. *These engineers did not solicit or take orders for goods.* (Emphasis added)

The reference to the fact that the Norton engineers did not solicit or take orders would only be significant and meaningful if the engineers performed services associated with exempt sales. This follows from the fact that the Chicago retail outlet and warehouse performed services on all but exempt sales and these services, in and of themselves were sufficient to justify taxation. It is, therefore, only on those direct sales held to be exempt that the reference to the non-involvement of the engineers and solicitation or order-taking would be relevant. There is no other reasonable explanation for the court's reference to the fact that these engineers did not solicit or take orders except that the group of engineers performed services associated with exempt sales.

(2) The Washington Supreme Court in *B. F. Goodrich, supra*, and the United States Supreme Court in *Norton*, both noted that the Norton engineers consulted with prospective customers as to their needs and offered technical and engineering advice on the Norton products. Picture these engineers in their office, available to consult with a customer. A customer, or a prospective customer, contacts one of these engineers with an engineering problem, or wants to consult with an engineer concerning the Norton products. Contrary to respondent's interpretation of *Norton*, it is certainly not reasonable to assume that prior to consulting with the customer, or prospective customer, the engineer would inquire of the customer as to whether the customer was placing his order direct to Massachusetts and receiving shipment back, in which case, the engineer would decline to render services, or whether the customer expected the help of the Chicago retail outlet and/or warehouse in this sale, and if so, to what extent. And what

would the engineer do if the customer had not yet decided how the order would be placed? And further, such an inquiry would only be relevant after the *Norton* decision in any event, unless we are to assume further that the Norton Company and its engineers were able to predict the outcome of the *Norton* decision.

(3) There is nothing in the *Norton* opinion which states or implies that these engineers were not offering engineering assistance to customers involved in direct sales. On the contrary, the *Norton* opinion describes the engineers as providing engineering services to customers without limitation. If, in fact, the Norton Co. engineers did not provide engineering assistance to a certain class of customers, such a critical fact would certainly have been mentioned by the court in its opinion.

Based on the above, it is clear that the Norton Co. engineers performed services in connection with sales held to be exempt from taxation.

Appellant's reading of the *Norton* case is in accord with *General Motors Corp. v. State, supra,* where this court stated that "taxation of those who perform de minimus activities through a local office would be unreasonable and unjust" (60 Wn.2d at 874). This court further stated that the presence or absence of a local office does not in and of itself decide the question, and, therefore, taxation of a corporation who maintains even a formal local office may nevertheless violate due process. This court observed in this regard that:

> The essential inquiry must be directed to the *amount and effect* of the activities involved and not the form of the operations. 60 Wn.2d at 874. (Emphasis added)

In addition to the due process violations outlined above,

the assessment of the tax on appellant also is taxation of sales in interstate commerce in violation of the interstate commerce clause in the federal constitution. As stated by the United States Supreme Court in *Norton,* the direct sales which were filled by shipments directly to the customer, with the only in-state involvement being the activities performed by the liaison engineers, were within the protection of the commerce clause being sales in interstate commerce and, therefore, were sales which were not subject to the Illinois privilege tax.

In *McKinnis Travel Service v. State,* 78 Wn.2d 229, 232 (1970), this court held that the following tests represent the guidelines to be employed in judging the state's power to levy a gross receipts tax on activities connected with interstate commerce:

> (1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage when competing locally; the discrimination text. (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; the multiple burden test.

In the case at bar, on the authority of *Norton Co. v. Dept. of Revenue, supra,* the significant taxable incidents occurred outside of the State of Washington. There is no local outlet; all significant incidents of the sale and delivery take place in either California or Pennsylvania; appellant owns no property in the State of Washington; all inventories are maintained outside of the state; all of the negotiations concerning the sale to Boeing are conducted from appellant's home or branch offices; and coordination between appellant and Boeing in the qualification process is conducted by appellant through its out-of-state offices en-

tirely. Not only is there a substantial risk of multiple tax burdens, it would appear that Pennsylvania and California may be the only states who can tax the privilege of appellant's sales to Boeing, and, therefore, the sales to Boeing are exempt from the Washington Business and Occupation Tax. The burden on appellant here, as stated in *McKinnis Travel Service v. State, supra,* is to:

> . . . affirmatively show that the plaintiffs (appellants) are taxable elsewhere . . . 78 Wn.2d at 233.

The burden, therefore, is not to show that appellants, in fact, are taxed elsewhere, but merely that the taxable situs is located elsewhere. Appellant contends that the record clearly shows that the taxable situs for a privileged tax on sales to Boeing is in Pennsylvania or California, and, therefore, respondent's imposition of the Business Occupation Tax on appellant creates the risk of a multiple burden on appellant's interstate commerce.

The opinion filed by the Court of Appeals below is a radical extension of *General Motors Corp. v. State, supra,* which could not have been contemplated by either this court or the United States Supreme Court. If the decision of the Court of Appeals is allowed to stand, any business which has a "resident employee" in this state, for whatever purpose, and regardless of the amount and effect of the activities of said employee, would be subject to the Business and Occupation Tax.

IV
OPINION

A copy of the opinion of the Court of Appeals, dated December 3, 1973, is attached hereto.

Respectfully submitted this 15th day of January, 1974.

s/ KENNETH L. CORNELL
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STANDARD PRESSED STEEL CO., *Appellant,* v. DEPARTMENT OF REVENUE, *Respondent.*	No. 43099 REPONDENT'S ANSWER TO PETITION FOR REVIEW

Appellant requests this court to take jurisdiction of this matter (referred by this court on March 2, 1973, to the Court of Appeals) upon the grounds that (1) the opinion of the Court of Appeals violates the state and federal due process requirements and the commerce clause prohibition of the federal constitution; and (2) the opinion is in conflict with *B. F. Goodrich Co. v. State,* 38 Wn.2d 663, 231 P.2d 325 (1951); *General Motors Corp. v. Washington,* 60 Wn.2d 862, 376 P.2d 843 (1962), aff'd., 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964); *Norton Co. v. Department of Revenue,* 340 U.S. 534, 95 L.Ed. 517, 71 S.Ct. 377 (1951); and *McKinnis Travel Service v. State,* 78 Wn.2d 229, 472 P.2d 392 (1970).

To substantiate its claim that the Court of Appeals' opinion is in error and should be reversed by this court, the appellant purports to compare the facts in this case concerning its wholesaling activities in this state, with the facts pertaining to the exempt retail sales in the *Norton* case and demonstrate by this comparison that *Norton, Goodrich,* and *General Motors* specifically support its claim for tax immunity.

While respondent believes that the opinion of the Court of Appeals and its answering brief adequately refute ap-

pellant's claim, respondent wishes to emphasize here the complete lack of any factual basis for appellant's claim.

It is the respondent's position that appellant's claim of constitutional immunity is based on at least three fundamental errors, namely: (1) An incomplete statement and a misconstruction of the significance and operative effects of the facts pertaining to its wholesaling activities in this state; (2) A misstatement of the facts in *Norton* pertaining to Norton engineers and on wholly unsupportable inferences concerning the nature and extent of the Norton engineers' activities in Illinois concerning the exempt Norton sales; and (3) On an erroneous interpretation and application of the rules of law established in the *Norton*, *Goodrich* and *General Motors* decisions.

A comparison of the facts in this case, with the facts in *Norton* pertaining to the exempt *Norton* sales, clearly demonstrates that the Court of Appeals did not err by finding that the case at bar is distinguishable from *Norton*.

Without referring to the record in this cause and the specific findings of fact by the Court of Appeals, and without referring to the record or opinion in *Norton*, the appellant's petition is primarily devoted to drawing unsupportable factual analogies between the facts of this cause and the facts in *Norton* pertaining to *Norton* exempt sales. The petitioner's characterization of and significance and operative effect of the facts in this cause, as compared to the facts in the *Norton* case, *supra*, concerning the exempt *Norton* sales has not only been rejected by the Court of Appeals, but also by the trial judge and the Board of Tax Appeals. Each of these entities arrived at this result after an independent examination of the record in this cause and *Norton*.

In order to show that the findings of fact and conclusions of law as found by the Board of Tax Appeals and the trial court were supported by the record in this cause, the respondent set forth in its answering brief in the Court of Appeals what it deemed to constitute the facts in this cause, with references, where applicable, to the deposition (including exhibits) of appellant's Washington based employee Mr. Martinson, the Board's decision and order and the transcript in this cause. For convenient reference, that statement of facts set forth on pages 5-7 of respondent's brief is attached to this answer as Addendum A.

An examination of this statement shows that the Court of Appeals did not err in making the following findings:

> "Here the record clearly discloses that Standard Pressed Steel Company employed Mr. Martinson as a resident agent within this state to conduct business activities with the Boeing Company, in part out of his Washington residence as an office, so that Standard Pressed Steel could: (1) become aware of which of its products the Boeing Company might be able to use; (2) secure the testing of sample products to qualify the products for sale to the Boeing Company; (3) obtain the engineering designs for such products; (4) resolve problems in the use of the products after receipt and use by the Boeing Company; (5) obtain and retain goodwill and working rapport with Boeing personnel; and (6) secure and update lists of Boeing purchasing specialists or control buyers, and the commodities for which they are responsible, for the use of the personnel at the plaintiff's home office.
>
> "We are of the opinion that the foregoing substantial services constituted a sufficient peculiarly local and distinct taxable incident within the State of Washington such that imposition of the business and occupation tax was not on the privilege of engaging in interstate commerce, but rather on the privilege of doing

local business."[1] (Opinion of Court of Appeals, pp. 5-6)

• • •

"We are satisfied that the local activities of Mr. Martinson were instrumental in establishing and maintaining the Boeing Company as a market for the sales giving rise to the proceeds by which the state seeks to measure this tax. We therefore conclude that because the gross receipts from plaintiff's sales to the Boeing Company were reasonably related to the local incidents of the tax, imposition of the business and occupation tax here was not offensive to due process."[2] (Opinion of Court of Appeals, p. 8)

There is absolutely no evidence in the *Norton* record or language in the *Norton* decision that indicate any comparable facts or factual findings or conclusions were involved in *Norton*.

The only reference in the Supreme Court decision to Norton's engineers is the following:

1. The Board of Tax Appeals, in its order and final decision in this cause (Docket No. 74-41) and the trial judge in his oral decision and findings of fact made findings of fact comparable to that of the Court of Appeals.

2. This conclusion is identical in substance with the conclusion found by the trial court and comparable to the conclusion arrived at by the Board of Tax Appeals wherein it stated in regard to its factual findings: "We find that these factors were a necessary and vital part in the appellant's ability to gain its market with The Boeing Company in this state in the first instance and to hold its market with Boeing in the second. We find that without these factors, secured through the person of Mr. Martinson, or by some other qualified agent or agency of the appellant in this state, it is very unlikely the appellant could have secured or retained The Boeing Co. as its customer. We find that Mr. Martinson's activities, although not directly concerned with the writing of a sales order, the making of delivery, or the procurement of payment, constituted all the activities of selling necessarily preliminary to the writing of orders. We find the sales activities of Mr. Martinson to be of such importance that the writing of the orders and subsequent activities of delivery and payment are only the end result of his intensive and extensive activities and the activities of the visiting groups of appellant's engineers in this state."

". . . But no solicitors work the territory out of either the home office or the Chicago branch, although petitioner will supply engineering and technical advice. . . ."

The only evidence in the record in the *Norton* case concerning engineering activities was the following testimony set out on page 20 of the transcript of record, concerning activities out of the Chicago office of Norton:

". . . we have abrasive engineers who go out to the customer and advise him on technicalities of grinding wheels, what wheels would perform the work, etc.; the engineers go in the field after the order is in; they do not solicit; it is just technical advice; we have no men in the field from the Chicago office taking orders; . . ."

The Supreme Court of Illinois in *Norton Co. v. Department of Revenue*, 405 Ill. 314, 90 N.E.2d 737 (1950) in reference to the engineers stated:

"There are no salesmen used by appellant, but it does have a group of engineers available to consult with prospective customers on their needs. These engineers do not solicit or take orders for goods."[3]

There is no evidence or judicial statement in *Norton* that associated the Norton engineers' activities with any exempt sales in *Norton*.

Since the Supreme Court held in *Norton* that any exempt sales must be disassociated from local activities, the Supreme Court predicated its decision on the assumption that the activities of Norton engineers did not constitute local business associated with the exempt sales.

Appellant's statement on page 5 of its petition that "It

3. This court in *B. F. Goodrich Co. v. State*, *supra*, repeated this language from *Norton* in its discussion of *Norton* (38 Wn.2d 663 at 670, quoted on page 5 of appellant's petition).

is also clear that the services of the Norton Co.'s corps of liaison engineers were directly associated with those sales to Illinois customers held by the court to be non-taxable" is unsupportable by the record and opinion in *Norton*.[4]

From the foregoing, it is self-evident that *Norton* facts concerning the exempt sales are readily distinguishable from the facts in the case at bar. As found by the Court of Appeals, the trial court, and the Board of Tax Appeals, the appellant's activities in Washington far exceed merely making engineers available to Boeing for consultation. They constituted decisive factors in appellant establishing and maintaining Boeing as a market for its products. In no sense can they be characterized as de minimis as to appellant's wholesale sales to Boeing.

Under these circumstances, it is error for the appellant to argue, on authority of *Norton*, *Goodrich* or *General Motors* that its Washington activities are inadequate (i) to establish taxable nexus (Washington jurisdiction to impose its B&O tax on appellant's Washington wholesaling activities) or (ii) to permit the tax in question to be measured by gross receipts derived from Boeing within the purview of commerce clause limitations.

In *Goodrich*, this court noted:

> "We only interpret the *Norton Co.* case as holding that such a tax [a business privilege tax] may not be levied upon the proceeds from sales with which the local outlet had nothing to do." (38 Wn.2d 675)

4. For a proper interpretation of the facts and holding in *Norton*, the dissenting opinion of Mr. Justice Clark is instructive. He concluded that the direct sales under the test laid down by the court in *Norton* should also be taxable because the taxpayer had not established that the services rendered by the Chicago office were not decisive factors in establishing and holding the Illinois market for Norton's direct sales. Obviously, a majority of the court thought otherwise.

General Motors makes it crystal clear that the B&O tax on wholesaling is valid if the taxpayer's activities in the taxing state are decisive factors in establishing and holding the wholesale market and the taxpayer has not disassociated the wholesale sales from these activities. This accords with the express holding in *Norton*. Any so-called de minimis rule either as to due process tax jurisdiction or as to the measure of the tax is inapplicable where the taxpayer exercises substantial and decisive wholesale activities in the state of destination and these activities have not been disassociated from the wholesale sales used as a measure of the tax liability.

In the language of *Norton*:

> "But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." (340 U.S. 537)

In *General Motors, supra,* after analyzing the general principles applicable and the facts pertaining to General Motors activities in Washington, the Supreme Court concluded:

> ". . . we can only 'conclude that, in the light of all the evidence, the judgment attributing . . . [the corporation's Washington sales to its local activity] was within the realm of permissible judgment. Petitioner has not established that such services as were rendered . . . [through in-state activity] were not decisive factors in establishing and holding this market.'" (Material quoted by the Supreme Court was from *Norton Co., supra,* at 340 U.S. 538)

Inasmuch as the facts establish that appellant came into the state of Washington to do a local business in connection with its wholesale sales and that this activity is clearly associated with its wholesale sales in this state, *Norton, Goodrich* and *General Motors* are dispositive of this case and establish the correctness of the decision of the Court of Appeals. These cases indicate that there is no merit to either appellant's due process of law or commerce clause arguments.

Appellant's reliance on *McKinnis Travel Service, supra,* and its argument that the state of origin can tax the wholesale sales in question with the result that these sales are exposed to multiple taxation is equally unfounded. Appellant cites no authority nor is respondent aware of any that establishes that the state of origin has jurisdiction to tax the sales in question. As stated by the Court of Appeals, *General Motors, supra,* and *Washington-Oregon Shippers Cooperative Association, Inc. v. Schumacher,* 59 Wn.2d 159, 367 P.2d 112 (1961) is dispositive of this issue.

CONCLUSION

The appellant's claim that the Court of Appeals decision is contrary to controlling judicial precedent stems primarily from its failure to properly analyze and give proper weight to the *facts* of this cause. In essence it argues that even though it conducts an intrastate business in this state which was carried on solely in connection with its wholesale sales in question and even though this business was necessary for it to make these wholesale sales, nevertheless it is constitutionally exempt from the B&O tax on wholesaling. No authority supports this novel interpretation of either due process of law or interstate commerce

limitations on a state's taxing power. It is therefore respectfully submitted that this court should decline to take jurisdiction of this matter.

DATED this 25th day of January, 1974.

SLADE GORTON
Attorney General

/s/ WILLIAM D. DEXTER
Assistant Attorney General
Attorneys for Respondent

ADDENDUM A

The appellant appeals only the imposition of the B&O tax upon its bolt division activities during the period in question. The bolt division is composed of three groups: aerospace, nut and umbrako (Dep. 20). The appellant, through these groups, manufactures highly specialized industrial and fastener systems (Ex. M, Dep. 21-22, BTA order 1, Tr. 4). The appellant has its manufacturing plants in Santa Ana, California, and in Jenkintown, Pennsylvania —its home office (Dep. 4, BTA order 1, Tr. 4). During the period in question, its principal customer in this state was Boeing in Seattle (Dep. 4-5, BTA order 1, Tr. 4).[1]

The appellant had Mr. Martinson, a resident employee, in the state during the period in question. Martinson was a "sales engineer" (Dep. 2, BTA order 1, Tr. 4). His supervisor was the "sales manager" (Dep. 6). His typing was done by the sales manager's secretary (Dep. 6). In training for his job, Martinson spent many weeks in the appellant's plants learning how the products were made and the general technology (Dep. 3). His training at the appellant's plants was continuous—about four trips a year to the plant for about a week or ten days at each plant. (Dep. 4).

In his home Martinson had a desk, file and telephone in a room which he used as his office (Dep. 5, BTA order 2, Tr. 5). His office was significant enough to qualify as such for federal income tax purposes (Dep. 6, BTA order 2, Tr. 5). The telephone was listed under Martinson's home address, but was used by himself and the appellant's visiting personnel for business purposes (Dep. 7-8, BTA order

1. Because the appellant treats its other customers in a similar manner but to a lesser degree, the case has been limited by agreement of counsel to the appellant's treatment of Boeing as a customer.

2, Tr. 5). An answering service was listed under the appellant which received calls for Martinson in the bolt division (Ex. K, Dep. 6-7, BTA order 2, Tr. 5).

On the job Martinson worked directly with Boeing design engineers, Standard's engineers, and project engineers (qualification engineers) (Dep. 4, BTA order 1, Tr. 4). In working with Boeing's engineers in the initial phases of aerospace design and construction, Martinson would become aware that Boeing was considering a certain fastener system (Dep. 5, BTA order 1-2, Tr. 4-5). He would initiate a products engineering request describing in necessary detail Boening's specifications and would send it to the appellant's chief engineer in Santa Ana, California (Ex. J. Dep. 20, BTA order 1-2, Tr. 4-5). If the appellant wished to qualify for Boeing's list of approved sources, samples were made by the appellant and shipped directly to Boeing for a qualification test (Ex. B, D, Dep. 14-16, BTA order 2, Tr. 5). Martinson would work with Boeing's engineers on qualification problems to make sure the appellant was a qualified source; and he would then notify the appellant if it had indeed so qualified (Ex. B, Dep. 3-14, BTA order 2, Tr. 5). Martinson informed the appellant of the subcontractors and the purchasing specialists or control buyers of each commodity for which it was a qualified source. (Ex. A, E-1, Dep. 17-19, BTA order 3, Tr. 6). He supplied the sales manager and other personnel of the appellant with a list of competitive prices at Boeing with explanations as to stock and delivery terms (Ex. A). Martinson neither placed nor accepted orders; therefore, Boeing placed its order directly with the appellant (Dep. 26, BTA order 2-3, Tr. 5-6). The appellant through its out-of-state offices, negotiated price and delivery date, accepted orders,

handled shipments and approved any credit (BTA order 2-3, Tr. 5-6). Martinson received a copy of each sales invoice (Dep. 25, BTA order 2, Tr. 5). Deliveries were made by the appellant directly through a common carrier (Dep. 25, BTA order 2-3, Tr. 5-6). No inventories were kept in this state (Dep. 24-25).

Once a product was sold, Martinson would work with Boeing's engineers as to any problem with the product (Dep. 10, BTA order 1-3, Tr. 4-6). The problem-solving process, including suggestions or modifications, was handled by Martinson with the appellant in much the same way as the qualification process (Dep. 10-13, BTA order 2, Tr. 5). The qualification process consumed 80 or 90 percent of Martinson's time, while the remainder was consumed by the problem-solving process (Dep. 26-27, BTA order 2, Tr. 5).

In addition to his product-oriented activities, Martinson performed public relation services, such as the arrangement for a hospitality room at a meeting of the Society of Aerospace and Process Engineers, which included Boeing engineers (Ex. C, Dep. 15, BTA order 2, Tr. 5). All expenses were sent directly to the home office (Dep. 15, 25-26). Martinson would also set up meetings between Boeing engineers and visiting groups of engineers of the appellant (Dep. 9, BTA order 2-3, Tr. 5-6). These visiting engineers were application engineers, coding engineers and general engineers who visit about three days every six weeks to discuss problems relating to the appellant and Martinson's activities with Boeing (Dep. 8-9, BTA order 2-3, Tr. 5-6).

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STANDARD PRESSED STEEL COMPANY, *Petitioner,* v. THE DEPARTMENT OF REVENUE, *Respondent.*	No. 43099 (1022-II) ORDER DENYING PETITION FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause together with the answer thereto,

It is ordered that the petition be and it is hereby denied.

Dated this 20th day of February, 1974.

By the Court:

/s/ FRANK HALE
Chief Justice

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

STANDARD PRESSED STEEL CO., *Appellant,* v. DEPARTMENT OF REVENUE, *Respondent.*	REMITTITUR No. 1022-II THURSTON COUNTY No. 44750

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on December 3, 1973, became the final judgment of this court in the above entitled case on February 20, 1974. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Six hundred twenty two dollars and 76/100 ($622.76) in favor of respondent and against appellant and against appellant's surety not to exceed the limit of the surety bond.

Petition for Rehearing denied January 3, 1974.

Petition for Review denied February 20, 1974.

CC TO:
Kenneth L. Cornell
Slade Gorton
Clerk of Supreme Court
Reporter of Decisions

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 21st day of February, A.D. 1974.

/s/ LAURENCE P. GILL
Clerk of the Court of Appeals, State of Washington, Division II.

[Affidavit of Service omitted in printing]

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STANDARD PRESSED STEEL CO., a foreign corporation, *Appellant,* v. DEPARTMENT OF REVENUE, *Appellee.*	No. 1022-II NOTICE OF APPEAL

To: Department of Revenue, State of Washington, Appellee

AND TO: Slade Gorton, Attorney General, and William D. Dexter, Assistant Attorney General, attorneys for appellee

AND TO: The Clerk of the Above Entitled Court

YOU AND EACH OF YOU are hereby notified that appellant Standard Pressed Steel Co., a foreign corporation, being aggrieved by reason of the opinion of the Court of Appeals of the State of Washington, Division II, filed on December 3, 1973, which became a final judgment on February 20, 1974, does hereby appeal to the Supreme Court of the United States from that certain opinion made, rendered and entered in this court and cause on the 3rd day of December, 1973 and which became final judgment of this court in the above entitled case on February 20, 1974, and from each and every part of said opinion and judgment adverse to the appellant. On the basis that the Business & Occupation Tax statutes of R.C.W. 82.04 are repugnant to the United States Constitution as applied to appellant and as construed by the court, appellant takes this appeal pursuant to 28 U.S.C. §1257(2).

DATED this 12th day of March, 1974.

s/ HAROLD S. FARDAL
Of Attorneys for Appellant

STATE OF WASHINGTON
BOARD OF TAX APPEALS

STANDARD PRESSED STEEL COMPANY, *Appellant,* v. THE DEPARTMENT OF REVENUE, *Respondent.*	70-41 Re: EXCISE—BUSINESS & OCCUPATION TAX

DEPOSITION UPON ORAL EXAMINATION OF
ROBERT MARTINSON

APPEARANCES:

For the Appellant: ROBERT K. KELLER, ESQ.
1220 IBM Building
Seattle, Washington

For the Respondent: SLADE GORTON, Attorney General
of the State of Washington by
MICHAEL B. HANSON,
Assistant Attorney General,
State of Washington
Temple of Justice,
Olympia, Washington

March 30, 1971
Seattle, Washington — [2]

BE IT REMEMBERED, that on March 30, 1971, at 2:00 o'clock p.m., at 1220 IBM Building, Seattle, Washington, before SUE MASTER, Notary Public in and for the State of Washington, appeared ROBERT MARTINSON, the witness herein;

WHEREUPON, the following proceedings were had, to-wit:

ROBERT MARTINSON,
being first duly sworn by the Notary
Public to tell the truth, the whole
truth and nothing but the truth,
deposed and said as follows:

DIRECT EXAMINATION

By Mr. Hanson:

Q Would you state your full name.

A Robert Martinson.

Q Mr. Martinson, where do you reside?

A Federal Way, Washington.

Q And how long have you resided in that area?

A Four years.

Q Four years. What is your capacity with the taxpayer in this case, Standard Pressed Steel?

A I was a former employee of theirs.

Q And what was your job title in that capacity with them?

A Sales Engineer.

Q What is your educational background?

A Animal husbandry in college.

[3] —

Q What school was that?

A California State Polytechnic.

Q Are you a member of any professional societies?

A No.

Q In the conduct of business in your job, were you required to have any knowledge of engineering techniques and engineering terminology?

A Yes.

Q To what extent?

A The majority of my job was working with engineers at Boeing to keep Standard Pressed Steel informed of new products as they were going to be used for the airplanes, or problem areas to make sure that we were qualified as a source to supply Boeing with these parts at the time it came up that they would

be purchased, and to just generally work with the engineers in the capacity of a man out in this area.

Q In dealing with these engineers, and in dealing with their—shall we say shop talk, was there any training? What training did you go through to engage in this type business?

A We spent many weeks within our own organization at our plants, going right out in the shop and learning how things were made, spending time with our engineers, getting the general technology of the products we were using.

— [4]

Q About how long would this type training last?

A It was a never ending type thing. We would go back and—sometimes we would—we have two plants, one in Los Angeles and one in Jenkintown.

Q That is Pennsylvania?

Mr. Keller: Yes, it is J-e-n-k-i-n-t-o-w-n.

A (continuing) I would probably make four trips a year to each of the plants, and spend maybe a week or ten days at each plant.

Q This is repetitious to a certain extent, but could you describe for me the type of employees with which you worked at Boeing Airplane Company?

A The design engineers, the standards engineers, the project engineers. I am trying to think of what they call that—it is the qualification engineers.

Q Mr. Martinson, did you service or did you represent Standard Pressed Steel in regard to any other customers other than Boeing Airplane Company in the State of Washington?

A No.

Q Are you aware of any other customers in the State of Washington of Standard Pressed Steel—the Bolt Division, I am referring to?

A Yes, there are several other small customers, but I was told not to spend any time with them because

[5] — the amount of business these people would give you was not worth your time.

Q For instance, who would these people be?

A Rohr, for example, in Auburn, Intercoastal Supply Company. It would be distributors of this type, small distributors who were selling to maybe some of the small manufacturers of Boeing.

Q In your dealings with Boeing as a customer, would that extend to the subcontractors of Boeing?

A No.

Q You would deal only with Boeing representatives, and not with their subcontractors?

A Right. I didn't make any calls on subcontractors.

Q In the conduct of your business, did you have an office?

A No, I had a spot in my home that I called my office.

Q Can you describe this, the extent of it?

A It was part of a room with a desk and a file and a telephone on the desk.

Q I have noticed some of your correspondence was typewritten. Who did the necessary work in that regard?

A As you will note, some of it is and some of it isn't, and depending on the workload, when I would send a report in to the home office, the girl would type it or not type it.

Q Which girl?

[6] — A Which girl?

Q Yes. You referred to the girl that typed it. Which girl was that?

A The sales manager's secretary.

Q Who was the sales manager?

A Harry Wilkinson.

Q Where is he located?

A Jenkintown, Pennsylvania.

Q And his secretary typed these typewritten ones. I assume you sent the handwritten correspondence to her, and she would type them at Jenkintown?

A That's correct.

Q So you did no typing personally, and no office work of that nature?

A Right.

Q On your Federal Income tax return, did you take a deduction for the use of you home as an office?

A Yes.

Q You mentioned you had a telephone in your home. Was the telephone under a separate listing?

A No, sir.

Q Was there any answering service in regard to that?

A We do have an answering service in the Seattle area.

Q In the Seattle area. What answering service is that?

A I don't recall. The bills were sent directly to Jenkintown. — [7]

Q Did you correspond with them in any way, other than the normal routine of telephone business?

A With the answering service?

Q Yes.

A No.

Q The answering service conducted all business, and the listing was not the listing of your home?

A No.

Q Do you remember what exchange it was listed with?

A The name of the company?

Q Well, what was the telephone exchange?

A 322-5600 was the number.

Q What is hour home number?

A VE 8-9118.

Q Did you use your home telephone number at any time regarding the conduct of your business?

A Yes. You mean did I pick it up and call somebody from Boeing?

Q No. Let me clarify the question. Did you refer your number to customers in your conduct of the business, for you to be contacted at your home directly, rather than through the answering service?

A Yes.

Q Are there any other people retained by Standard Pressed Steel, Bolt Division in the State of Washington other than yourself and the answering service? [8] —

A No.

Q Do any employees of Standard Pressed Steel, Bolt Division, come into the State of Washington other than yourself?

A Occasionally, yes.

Q What is the nature of their business?

A The majority of the time it is to work on engineering problems.

Q How long would they be here? Can you give us any estimate as to the length of time spent by these individuals in the State of Washington, and particularly in this regard, referring to the tax period of 1968 and through the majority of 1969?

A You mean the total number of days?

Q Yes, the extent of time, the months, days, weeks, whatever it would be.

A It would be days, and I would say maybe three days every six weeks.

Q Three days every six weeks. Very good. I assume Wilkinson would be one of the people who would visit?

A He did not.

Q He didn't visit?

A No, sir.

Q What type of Standard Pressed Steel employees would visit?

A Well, our application engineers, our coding engineers, and maybe some of our general engineers for a general problem. — [9]

Q What was the nature of their visits?

A To discuss problems in bolts or bolting material or codings in conjunction with the airplane that Boeing was building.

Q I assume they would all stay in the Seattle area?

A Yes.

Q When they were staying in the Seattle area, how would the customer, Boeing, contact these individuals?

A Well, I would know when they were coming, and I would know what they were coming out for, and I would set up the meetings for them.

Q There was apparently an office of Standard Pressed Steel in the State of Washington up to 1966, is that correct?

A Yes, I believe so.

Q And this office no longer exists, is that correct?

A That's right.

Q The functions that were performed by that office, where are they presently handled?

A Either in the plant at Santa Ana or in the plant at Jenkintown.

Q What functions did the office perform?

A I don't know. I wasn't here.

Q You weren't here until after that office had closed?

[10] — A Right.

Q With regard to correspondence with the home office, how frequently would you say that correspondence was?

A I am not going to say—don't put this down.

(Discussion off the record.)

A (continuing) I would try to write reports on things that were important enough that I would want—even though I talked to them on the telephone, and explained to them what was going on, I wanted to have something in writing so that at a period of time when something was not done, they couldn't come back to me and say, "Why didn't you tell us this," so it was just the important things I thought were necessary that they should do; also, the things I felt where it became something that many people would get involved in, I always wrote a letter with a copy to those people.

Q I am skipping a little bit here. I am speaking now of a product by Standard Pressed Steel as sold to the Boeing Company, and in the course of this product, problems arise. What function did you perform in that regard?

A I call on the engineers and find out what problems they are having with the product, and then I would go with them to the area where they are having the problems and discuss with the people out in the manufacturing line how they were installing these things, what type tooling they were using to install
[11] — these things with, and then write a report to our people, telling them what the part was and the installation methods and everything pertinent to the problem, and we would in turn try to duplicate the problem in our laboratory, and then an answer—they would come up with some type answer, and in turn

would forward the answer to me, and they would forward to me a laboratory report type form, and they would call me on the phone, and we would discuss it, and I would go and present this to Boeing.

Q I suppose some of this work you might classify as original work. It was not originally the type product you were giving to Boeing, but a new product or a new form of that product?

A Not necessarily.

Q Not in all cases?

A I guess I could qualify that by saying any time you change something on a bolt or a nut, you change the characteristics of the bolt or the nut, and for example, if you would put a different type lubricant on it, you might change the torque tension relationship. If you put a different type plating on it, you might change the torque tension relationship, and you might also through this plating, cause a problem with the material itself.

Q Let's deal with a hypothetical. You are called upon by the customer in regard to a mechanical bolt situa- — [12]
tion, where the product as given to them in the present manner does not work in its present form without outside modification such as lubricants and such other items as are added to or subtracted from the article, but it calls for some type change in the article; what takes place at that time?

A Who determines that there is a change made, Boeing, or do we determine it?

Q For instance, who would determine this? Let's even qualify the hypothetical further, that Boeing has called you with regard to a problem, and in your judgment there needs to be changes in the item.

A We would make a suggestion, and then it would depend on the engineering people to decide whether or not they felt that our suggestion would solve the problem.

Q In forming the suggestion of the company, to what extent would that contribute to the servicing process?

A Are you talking about me, as an individual or we as a company?

Q You as an individual.

A Well, I would get a laboratory report, and as I said, we would try to duplicate the problem that Boeing was having with the parts. When I would receive the laboratory report, then I would call the people who ran the test and discuss this with them, and also what we would recommend as a change to solve the problem. I in turn would then go to the Boeing people about this.

[13] —

MR HANSON: Off the record.

(Discussion off the record.)

Q (By Mr. Hanson) Mr. Martinson, I am referring here to a document, which is labeled—it has no dates. It is apparently some correspondence of Mr. Wilkinson at Jenkintown. It is marked with a designation "A". What is the purpose of that correspondence? Could you perhaps describe it in some manner?

A This report was written so that our people, the outside people like myself, and the inside people, would know what the Boeing subcontractors would be, and what attempts they would make, and the approximate value of the items they would make for the first two prototypes of the SST.

Q What purpose does that serve for Standard Pressed Steel?

A It serves several purposes, I guess. One is that when our inside people receive a quotation from one of these people, they would know it would be an SST requirement.

Secondly, it would help our people to determine maybe the amount of business that we could expect from these people in the next year.

Q That would be, now, the subcontractors listed?

A Yes, sir.

Q In regard to the contact with these subcontractors, in regard to their business, who in your company would handle that operation?

— [14]

A An outside sales engineer like myself.

Q I refer you now to some correspondence which is updated, and has the designation "B". What is Fairchild-Hiller?

A Fairchild-Hiller is a subcontractor of Boeing on the SST.

Q And it refers in the correspondence to an approved list. What is an approved list?

A Well, anything you manufacture for Boeing, you have to have qualified at the Boeing source. Boeing determines who will be a supplier of theirs by qualifications done here in the Seattle area.

Now, all of their subcontractors have to buy their requirements from people who are on this approved list. This approved list generally is always on the drawing itself. The drawing shows what the part looks like, and the dimensions and everything else, and it will say "Approved sources are:"

You might get the qualification pieces after a drawing has already been issued, and they will in turn write a letter to Standard Pressed Steel, and a sheet saying that Standard Pressed Steel is an approved source, and what I wanted in this letter to do, was to let our people know that they could go to Fairchild-Hiller and say "Yes, we are an approved source of Boeing on this."

Q That is just what I need right there. That is perfect. Sometimes paraphrasing may be a bit difficult, but just explain it the best you can, how it is and what is your interest. Just give us your impression.

— [15]

I am now referring to correspondence dated April 10th, and which I have marked with a "C". Would you explain the nature of that correspondence.

Q That was to inform Mr. Baumgartner that I had made arrangements for a hospitality room at the Olympic

Hotel for the Society of Aerospace Materials & Process Engineers' meeting here.

Q And in that respect, the company itself would take care of the necessary expenses?

A Yes.

Q Is this society a local society?

A No, sir.

Q Were the participants in that meeting limited to Boeing engineers?

A No, they are from all over the United States.

Q I am referring now to some correspondence dated April 18, 1969. Would you explain the nature of that correspondence?

A I am trying to get my mind back here. When was this, 1969?

Q I think I can be of assistance. My question is in a general way, what is the purpose of this correspondence?

A Well, what I am trying to tell them is that Boeing says "No, they don't want any shortcuts in their qualifying testing. They want you to run two samples with two different counterbores and two different thicknesses." I am referring specifically to the last paragraph. This is a new product and this is in the early days of the development of the 747, and I felt that this product had a potential use in the 747 market, and also tremendous potential for the aerospace industry in general. [16] —

Q This product here was solely for the needs of the Boeing Airplane Company, is that right?

A No.

Q How did it arise?

A It arose because probably we felt that the existing product that they were using, or that the industry was using could be improved upon, and our research and development people spent some time and some

effort in trying to come up with a new way of doing something.

Q And what other market is this new product used in, do you know?

A It would have a potential in the electronics industry. Are we talking about a specific product, sir?

Q I am talking about the reference in this last paragraph, in other words, "Let's go after this market."

A This market would be a nut market, and the nut market would be anyplace where they used nut plates, which would be the electronics industry or the aerospace industry. In some instances you used them on shelving material, shelving, this type of thing. — [17]

Q Do you know any specific customer, other than Boeing, that uses this product?

A Boeing doesn't use it.

Q Boeing doesn't use it?

A No, sir.

Q I am referring now to pieces of correspondence, the first one dated September 26th, which is labeled "E," and on the same date, labeled "F," on October 6th, "G," on October 7th "H," and on the same date, October 7th, correspondence marked "I," all of 1969.

In looking at all of this correspondence as a group rather than individually, as a group, what is the purpose of this correspondence?

A Boeing goes through so many reorganizations, and changes locations so many times, and personnel, you deal with specifics. These pieces of correspondence try to tell our people which people are now handling certain products.

Q The sixty-four dollar question, if you will pardon a trite phrase, why does Standard Pressed Steel need to know this information?

A Well, for many reasons. As an example, a quotation was given to one of our people, at Jenkintown or

Santa Ana, and at one time they were dealing with Mr. "X", and the next day, Mr. "Y" called, and they would want to know why is Mr. "Y" calling, has there been a change in the organization. [18]—

Q I understand that. My question goes to why would the people down at Santa Ana or Jenkintown, for instance—up to this time we have always been talking in terms of the context of your relationship to the customer.

Now, it appears that there is a relationship of either Santa Ana or Jenkintown directly to the customer, of which you are not an intermediary, shall we say, right?

A Well, there are many things that come up. For example, if an order is placed with our facilities and one of the Boeing people wants to follow up on it to see where the delivery is, why the order was late, they don't come to me.

They go to either of the two plants, and you tell them their phone number, or you can get the order for them. As you will notice, the phone numbers are different. This could be that they moved from one location to another location, and it just informs our people what people are buying.

Q In addition to the individuals who are listed as purchasing specialists or control buyers, there are other individuals listed. I refer to a number of individuals on correspondence "G." Of what particular interest are they, as opposed to the purchasing specialists? [19]—

A These would be the people that actually work for the purchasing specialists, and these would be the commodities that they themselves would be responsible for.

Q In this aspect, it lists the titles of some individuals as production specialists, and on other individuals, it does not list a title. What would be their function with Boeing Company?

A I am sorry, I don't understand what you are saying.

Q As for example, let's take the name of Rouse, or Maxwell or Tucker, what type of classification are they? What position would these people have with Boeing Company?

A As you notice, the name above that is Shish, referring to a purchasing specialist?

Q Correct.

A The people below him report to Mr. Shish, and he would be their group leader or supervisor, and they in turn would be responsible and for problems or for consultation, they would go to Mr. Shish.

Q What type qualifications do those people have? I am speaking of their educational background? What type qualifications would they possess?

A I don't work for Boeing. I don't know what they actually would have to have. Off the record, I think they are all college graduates.

Q I am going to a document marked "J." There are a group of documents like it. I am interested not in this specific document, but generally, what does this document do? What is its purpose in the conduct of your business? [20]—

A I am telling our engineering people that Boeing is considering replacing a certain type of fastener with another one, with another type, and if we want to make qualification pieces, I have given them the diameter they will have to make it, and also Boeing specifications, which they will have to qualify it to.

Q The title for the document is Products Engineering Request. Who is this document submitted to?

A This document is submitted to Troyce Wiley, the chief engineer in the Santa Ana plant.

Q This document does not go to Mr. Wilkinson?

A There is a copy to him, and a copy of it went to him when he was not sales manager, and he is not sales manager right now. He has another title.

Q There are three fastener system classifications, I guess, which would be listed in these documents. Could you give me a rather brief explanation of what these three are?

A Yes, this one is circled Aerospace. Our division is broken down into several groups, one of which is Aerospace, another of which is Nut, and another of which is Urnbrako. This shows that this is an Aerospace product. It doesn't show in the Nut products, and it doesn't show in the Urnbrako products.

[21] —

Q Do you handle that product in other lines?

A In other lines?

Q What is the Nut line, as opposed to the Aerospace line? What is the difference?

A Aerospace generally is thought of as bolts and nuts or things that go on bolts, and this is in the Nut division.

Q I am beginning to understand the extent of specialization.

A It is a system, but as far as engineering goes, we have people to take care of bolts, and we have people to take care of nuts.

Q I am asking here for a point of reference, because this testimony may be examined by people who are not of any qualification other than just the average home repairman. Normally, when I go to my hardware store, I buy a bolt and a nut together. They have to fit, and they have to have the same type ribs?

A Threads?

Q Yes, the same type threads on them. Are we saying in this particular context the Aerospace field and the other fields are so specialized that we talk about an individual bolt and a nut, and how do they get together?

A Yes, we do. You talk about them separately. When you use a bolt, a bolt has to go through metal, and these are all high precision bolts, close tolerance

— [22]

bolts, and the majority of the holes you go through are close tolerance holes, and I am talking about a tolerance of maybe 2/1000ths. Your bolt material will go through whatever it is holding together.

Q So what we are saying is that there need not necessarily be a nut onto the bolt?

A If they didn't need threads on it, they wouldn't need a bolt. They could just put a pin in it. The reason for the threads and nuts are for vibration purposes, so when you put the nut on it, it won't fall out of the hole, but even more than that, the nuts you buy at the store are not the nuts and bolts that go on your airplane that Boeing used. They use nuts so they will not vibrate off, and they pass a vibration specification.

Q So on summing this up, simply because it is circled Aerospace, doesn't necessarily mean that is Boeing. You might also circle Nut in regard to Boeing customers?

A Yes, this is a standard form that we have. It is used by all of our people when they are jotting little memos down to our engineering people.

Q Briefly, what is the Urnbrako Division?

A They make sockets, capscrews, socket screws, dowel pins, spring pins, and generally they are the type items that are not used in the Aerospace industry.

Q Do you know if there are any other Standard Pressed Steel people in the State of Washington at this point? — [23]

A Not taking care of this division.

Q But do you know, outside of your division, do you know if Standard Pressed Steel engages in this market in the State of Washington at all?

A I am sure they do, through some distributors.

Q When you say through distributors, could you explain?

Off the record.

(Discussion off the record.)

A Well, all of the products that Urnbrako sells they do sell through distributors, rather than direct sales, such as the Aerospace Division does or the Nut Division does. They have their own people, and I believe the man comes from San Francisco who calls on the Seattle area.

Q And he is a direct employee of Standard Pressed Steel?

A Yes.

Q What is the Worley Division of Standard Pressed Steel?

A I think they make lockers.

Q Do you know how they are distributed in the State of Washington?

A No, sir.

Q Are you familiar with Frank Cohen, Inc.?

A No, sir.

Q Have you had any contact with Frank Cohen, Inc.?

A No, sir.

[24] — Q During the period 1968 and up to November of 1969, did you have any contact with anyone in the State of Washington regarding the Urnbrako Division or the Worley Division?

A No, sir.

Q I am showing you, Mr. Martinson, page 841 of the 1970-71 Seattle telephone directory. Under Standard Pressed Steel there are two listings. Do you have any knowledge of these listings?

A Yes, sir.

Q You mentioned the number EA 2-5600 was your answering service?

A Yes.

Q What is the other number?

A I believe that is the Worley and/or Columbia Holwell people.

Q Are there occasions when people will have the numbers mixed up in trying to contact you?

A It has happened once. I believe if you would call that number now, it has been disconnected. I don't know for sure, I believe once that has happened since I have been here.

Q Why weren't the different divisions named, any particular reason you know of?

A I have no idea.

Q Mr. Martinson, in speaking of the Aerospace or the Nut Divisions, at any time during the tax period involved, were inventories kept in the State of Wash- — [25]
ington?

A No, sir.

Q In regard to the price and quantities of your products, did you perform any services for the customer?

A No, sir.

Q How is that handled?

A That is through either one of the plants, depending on the item that they want to have a price and delivery on, and they are given a price and delivery from either of the two plants.

Q How are the deliveries made?

A Well, by air or by truck.

Q Are you informed of the orders, deliveries, et cetera?

A I get a copy of the invoice.

Q In performing your function for Standard Pressed Steel, are you remunerated in any way based on the volume of orders?

A No.

Q Your fee is fixed, I assume?

A Yes.

Q In referring back to the promotional room, the complimentary room at the Olympic Hotel, to what ex-

tent were you reimbursed for your expenses in the cost of that function?

A All of the expenses were sent directly to the home office.

Q Were you provided directly with any reimbursed expenses of your own? I am speaking now of food and refreshment.

[26] —

A If I had any food or refreshment, I was refunded, I was paid for it.

MR. HANSON: I have no further questions.

CROSS EXAMINATION

By MR. KELLER:

Q I gather from your last testimony that you at no time ever received an order from any Boeing personnel for Standard Pressed Steel products, is that right?

A That's right.

Q And you never placed an order with Standard Pressed Steel on behalf of or at the request of Boeing, is that correct?

A To the best of my knowledge, that is not the procedure we follow.

Q The primary purpose of your time then was performed in advising Standard Pressed Steel of future production and qualifying Standard Pressed Steel, to assist them in qualifiying on the ones they were interested in, is that right?

A Yes.

Q What percentage of your time would you say was spent in performing those two functions?

A I would say 80 or 90 percent.

Q And the balance of your time was on complaints and visiting firemen, is that right?

[27] —

A Yes, that's right. When we would talk about these things, yes, sir.

MR. KELLER: I have nothing further.

(Deposition concluded at 3:15 p.m.)

(It was agreed by and between counsel and the witness that the reading, examination and signing of this deposition were waived, and that notice of filing was also waived.)

CERTIFICATE — [28]

STATE OF WASHINGTON }
COUNTY OF KING } ss.

I, the undersigned Notary Public in and for the State of Washington, do hereby certify:

That the annexed and foregoing deposition of each witness named herein was taken stenographically before me and reduced to typewriting under my direction;

I further certify that each said witness examined, read and signed his deposition after the same was transcribed, unless indicated in the record that the parties and each witness waive the signing;

I further certify that all objections made at the time of said examination to my qualifications or the manner of taking each deposition, or to the conduct of any party, have been noted by me upon each said deposition;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that each witness before examination

was by me duly sworn to testify the truth, the whole truth and nothing but the truth;

I further certify that the deposition, as transcribed, is
[29] —a full, true and correct transcript of the testimony, including questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination;

I further certify that I am sealing the deposition in an envelope with the title of the above cause thereon, and marked "Deposition" with the name of each witness, and promptly delivering the same to the Clerk of the above entitled Court;

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this ..... day of April, 1971.

Notary Public in and for the State of Washington, residing at Mercer Island.

EXHIBIT A-1

STANDARD PRESSED STEEL COMPANY
Intra Company Correspondence

FROM: R. Martinson

TO: H. Wilkinson

SUBJECT: SST Subcontractors

The Boeing subcontractors, what they will make and approximate Boeing cost for the two prototypes are as follow:

AERONCA - Middletown, Ohio	
Wing trailing edge flaps and flaperons	$6 million
CLEVELAND PNEUMATIC - Cleveland, Ohio	
Main and nose landing gear	$2.5 million
FAIRCHILD-HILLER REPUBLIC - Farmingdale, N.Y. and Hagerstown, Maryland	
Aft fuselage section, empennage main structure	$35 million
NORTH AMERICAN ROCKWELL - Los Angeles and Tulsa	
Leading edge flaps, outboard wing box, ventrical fin, rudders, tail leading edges	$35 million
NORTHROP - Hawthorne, California	
Cab and nose section	$12 million
ROHR - Chula Vista, California	
Engine pods, spares, test equipment, main landing gear doors	$21 million
BOEING - Wichita	
Two foreward fuselage sections, nose gear doors	$31 million

I feel it is important that all outside sales, inside sales and engineering departments at both Jenkintown and Santa Ana receive copies of this so that everyone will be aware of the SST subcontractors. This along with the list of all SST parts supplied earlier should help SPS in getting their share of the business.

A-1

RM/bt

[2

EXHIBIT A-2

SST Prototype Subcontractor Team
BOEING
NAFC
FMR
AERONCA
ROHR
WICHITA
NORTHROP
CLEVELAND PNEUMATIC
HEATH TECNA

EXHIBIT B

R. Martinson

H. Wilkinson

Potential Large Users of Beta III Rivets

Interviewed: R. Lee

Fairchild Hiller will be the largest user of rivets. They will make two body sections and the vertical and horizontal stabilizers. Northrup will make the nose and drop snoop.

Please make sure these customers know SPS is on the approved list. The other approved sources are:

Screw Corp.
Olympic
AIC
Hi-Shear
Camcar.

/bt

EXHIBIT C

STANDARD PRESSED STEEL COMPANY

Intra Company Correspondence

April 10, 1969

FROM: R. Martinson

TO: T. Baumgartner

SUBJECT: SOCIETY OF AEROSPACE MATERIAL & PROCESS ENGINEERS

I have contacted Gerry Long of the Olympic Hotel and made arrangements for a hospitality room September 8-9-10. Please advise me whether we are still going to participate.

RM/bt
cc: H. Wilkinson

EXHIBIT D

STANDARD PRESSED STEEL COMPANY

Intra Company Correspondence

April 18, 1969

FROM: R. Martinson

TO: H. Wilkinson

SUBJECT: Evaluation of Self-Clinching Nuts

In my letter of April 9, 1969, I submitted a request from Boeing to run a qualification test of the self-clinching nuts on the pieces they requested.

Jake Devlin asked Len Smith to discuss with me the possibility of cutting the number of samples - using only one counter bore in one sheet thickness instead of two. The answer is "no". I feel this product has the best possibility for making SPS become a sole source item for the industry.

Let's go after this market and prove to ourselves that SPS can market a new product!

Bob Martinson

RMiwcb
cc: F. Kinsella
J. Devlin
L. Smith
T. Baumgartner
C. Hood
File Copy

EXHIBIT E

STANDARD PRESSED STEEL COMPANY

Intra Company Correspondence

September 26, 1969

FROM: R. Martinson

TO: H. Wilkinson

SUBJECT: JOB RESPONSIBILITY AND PHONE NUMBER CHANGES FOR 737 GROUP

Here is the new job responsibility and phone numbers for the Seattle Division Material (737) effective 9/19/69.

Alex Tulentseff	Group Supervisor	655-1554
Len Curtis	Purchasing Specialist	655-1536
Roger Steeds	Control Buyer Rivets Nuts Nutplates Washers	655-1737
Chuck Pendleton	Control Buyer Taper-Lok Straight Shank Bolts (All alloys except LU series) Raw Material	655-1421
Al Hultman	Control Buyer Lockbolts Hi-Loks LU series bolts Collars AN, MS, NAS bolts & screws	655-8431
Donna Woodard	Clerk	655-1737

RM:pmb

cc: H. Burgmon, F. Corrigan, J. Devlin, W. Hoffman, W. Millar, W. Pompeo, D. Redman, J. Trilling

EXHIBIT F

STANDARD PRESSED STEEL COMPANY

Intra Company Correspondence

September 26,1969

FROM: R. Martinson

TO: H. Wilkinson

SUBJECT: JOB RESPONSIBILITY & PHONE NUMBER CHANGES FOR 707-727 GROUP

Here are the new phone numbers and job responsibility for the Renton (707-727) material group.

Hal Hammill	Group Supervisor	237-8698
Jim Hoffnquer	Purchasing Specialist	237-8618
Cal Parker	Control Buyer Hi-Loks Hi-Strength	237-3071-3072
Carl Thurman	Control Buyer Straight Shank A286 160 KSI Bolts	237-3794-3795
John Tinsley	Control Buyer Straight Shank Titanium medium and low strength bolts & screws	237-3794-3795
Dorothy Cox	Control Buyer Taper-Loks Lockbolts Blind bolts	237-3071-3072
V. Atkins	Clerk	237-3071-3072

RM:pmb

cc: H. Bergnon
F.Corrigan
J. Devlin
W. Hoffman
W. Millar
W. Pompeo
D. Redman
J. Trilling

EXHIBIT G

STANDARD PRESSED STEEL COMPANY

Intra Company Correspondence

October 6, 1969

FROM: R. Martinson

TO: H. Wilkinson

SUBJECT: New Phone Numbers for Everett Div. (747) Material Group. Also the job responsibility.

G. Thomas, Group Supervisor, will be leaving BOEING October 15; no replacement has been announced.

Shish - Purchasing Specialist, Major Fasteners, 386-3394.

Rouse - Titanium and Steel Taper-Lok and Titanium Straight shank Bolts, 386-2337.

Maxwell - Alloy steel and titanium Hi-Lok bolts, 386-2337.

Tucker - Steel, A286, H-11 and Managing bolts, 386-2276.

Shay - Nuts, nutplate, collars and alloy steel 180 KSI bolts, 386-2276.

Coats - Purchasing Specialist, minor fasteners.

Reidasch - Steel Hi-Lok bolts, 386-3415.

McDaniel - Steel lok and blind bolts and screws, 386-3415.

Richards - Washer, spacers bushing, insert, pin and studs, 386-2901.

Burt - Rivets and Riv-nuts, 386-2901.

MAIL STOP NUMBER: 03-22.

RM:bs

cc: W. Millar
F. Corrigan
J. Trilling
J. Devlin
W. Pompeo
W. Hoffman
H. Burgnon
D. Redman

EXHIBIT H

STANDARD PRESSED STEEL COMPANY

Intra Company Correspondence

October 7, 1969

FROM: R. Martinson

TO: H. Wilkinson

SUBJECT: MTU Group

This is the new organizational chart for the MTU Group.

RM:bs

Enclosure

cc: C. Hood
J. Trilling
J. Devlin
E. Gowen, Jr.

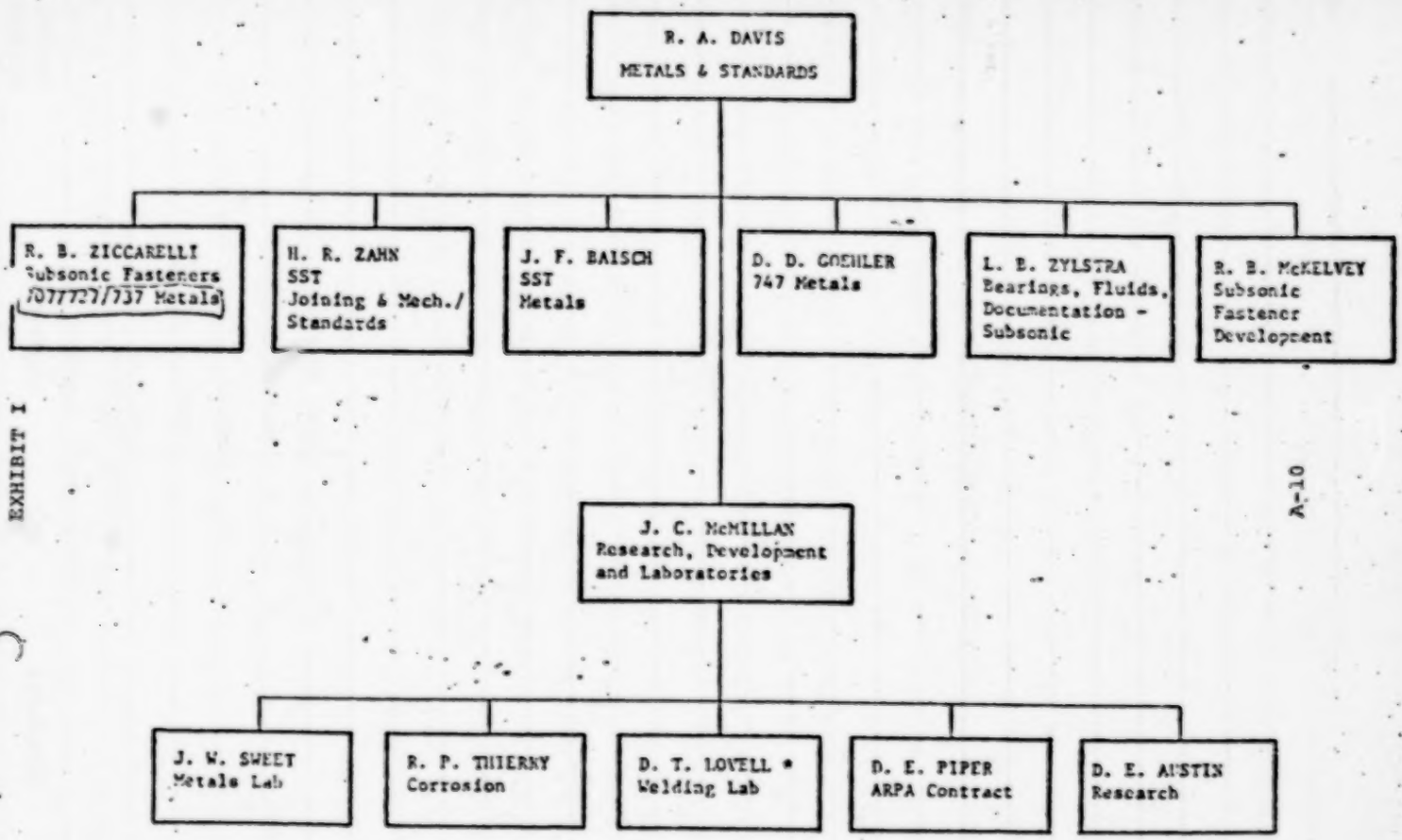
R. A. DAVIS
METALS & STANDARDS
R. B. ZICCARELLI
Subsonic Fasteners
/077727/737 Metals
H. R. ZAHN
SST
Joining & Mech./
Standards
J. F. BAISCH
SST
Metals
D. D. GOEHLER
747 Metals
L. B. ZYLSTRA
Bearings, Fluids,
Documentation -
Subsonic
R. B. McKELVEY
Subsonic
Fastener
Development
J. C. McMILLAN
Research, Development
and Laboratories
J. W. SWEET
Metals Lab
R. P. THIERRY
Corrosion
D. T. LOVELL *
Welding Lab
D. E. PIPER
ARPA Contract
D. E. AUSTIN
Research

EXHIBIT I

EXHIBIT J

PRODUCT ENGINEERING REQUEST | SPS DRAWING NO. | PROJECT NO.

AEROSPACE | NUT | UNBRAKO | FASTENER SYSTEMS

CUST. DRAWING NO. | REQUESTED BY | DATE

PRODUCT DESCRIPTION

TEMP. RANGE

TORQUE

PRELOAD

USED WITH

DOLLAR POTENTIAL

TARGET DATE | ENGINEER ASSIGNED | EXT.

PRODUCT ENGINEERING REQUEST

SPS DRAWING NO.

PROJECT NO.

AEROSPACE NUT UNBRAKO FASTENER SYSTEMS

CUST. DRAWING NO.

REQUESTED BY

DATE

PRODUCT DESCRIPTION

TEMP. RANGE

TORQUE

PRELOAD

USED WITH

DOLLAR POTENTIAL

TARGET DATE

ENGINEER ASSIGNED

PRODUCT ENGINEERING REQUEST | SPS DRAWING NO. | PROJECT NO.

AEROSPACE | NUT | UNBRAKO | FASTENER SYSTEMS

	CUST. DRAWING NO.	REQUESTED BY	DATE

PRODUCT DESCRIPTION

	TEMP. RANGE
	TORQUE
SPECS.	PRELOAD
MANCE SPECS.	USED WITH
	DOLLAR POTENTIAL

TH LEVEL

ATION

TED COMPLETE DATE	TARGET DATE	ENGINEER ASSIGNED	CAT.

MENDATIONS

PRODUCT ENGINEERING REQUEST	SPS DRAWING NO	PROJECT NO.

AEROSPACE NUT UNBRAKO FASTENER SYSTEMS

	CUST. DRAWING NO.	REQUESTED BY	DATE

PRODUCT DESCRIPTION

	TEMP. RANGE
	TORQUE
SPECS.	PRELOAD
NCE SPECS.	USED WITH
	DOLLAR POTENTIAL

LEVEL

ION

For application of S.P.U.
C.T. Tri Lobe Bolt with
Locking Pin 1 1-
Use CBC KEY S-9
Use KEY S-D

TED COMPLETE DATE	TARGET DATE	ENGINEER ASSIGNED	EXT.

ENDATIONS

PRODUCT ENGINEERING REQUEST	SPS DRAWING NO.	PROJECT NO.

AEROSPACE | NUT | UNBRAKO | FASTENER SYSTEMS

	CUST. DRAWING NO.	REQUESTED BY	DATE 5-7-7

PRODUCT DESCRIPTION

	TEMP. RANGE
L	TORQUE
SPECS.	PRELOAD
ANCE SPECS.	USED WITH
	DOLLAR POTENTIAL

H LEVEL

TION

BAC BIS FY-4-9
9-12
12-16
FW 4-8
8-12
12-16

ED COMPLETE DATE	TARGET DATE	ENGINEER ASSIGNED	EAT.

NDATIONS

PRODUCT ENGINEERING REQUEST | EPS DRAWING NO. | PROJECT NO.

AEROSPACE | NUT | UNBRAKO | FASTENER SYSTEMS

CUST. DRAWING NO. | REQUESTED BY | DATE

PRODUCT DESCRIPTION

TEMP. RANGE

TORQUE

PRELOAD

USED WITH

DOLLAR POTENTIAL

COMPLETE DATE | TARGET DATE | ENGINEER ASSIGNED | SAT.

PRODUCT ENGINEERING REQUEST | SPS DRAWING NO. | PROJECT NO.

AEROSPACE | NUT | UNBRAKO | FASTENER SYSTEMS

	CUST. DRAWING NO.	REQUESTED BY	DATE

PRODUCT DESCRIPTION

	TEMP. RANGE
	TORQUE
SPECS.	PRELOAD
RMANCE SPECS.	USED WITH
	DOLLAR POTENTIAL

TED COMPLETE DATE	TARGET DATE	ENGINEER ASSIGNED	EST.

PRODUCT ENGINEERING REQUEST | SPS DRAWING NO. | PROJECT NO.

AEROSPACE | NUT | UNBRAKO | FASTENER SYSTEMS

CUST. DRAWING NO.	REQUESTED BY	DATE

PRODUCT DESCRIPTION

	TEMP. RANGE
	TORQUE
	PRELOAD
	USED WITH
	DOLLAR POTENTIAL

To be known
as Unbrako Cheese

Tooling required
1. To manufacture to meet
the main Parts
2. To Trace main head
Profile.

TARGET DATE	ENGINEER ASSIGNED	EXT.

EXHIBIT K

EXHIBIT L

STANDARD PRESSED STEEL CO.

Intra Company Correspondence
November 4, 1970

OM: R. Martinson

H. Sturges

JECT: Competitive Prices at Boeing

As we discussed, Herb, SPS prices are considerably higher than our competition in this area. The following prices are from a recent quote. It is also interesting to note, Boeing didn't always buy the lowest price. Delivery and stock also entered into the decision. Most companies are quoting four week delivery.

Quantity	Part Number	SPS Price	Low Price	Bought For
500	LJ4D-20	64.00/C	39.00/C	47.60/C
500	LJ5D-20	90.50/C	50.00/C	75.10/C
250	LJ6-7	125.60/C	43.00/C	61.00/C
250	LJ6-17	146.10/C	45.50/C	61.00/C
1,000	LM3-8	28.70/C	13.00/C	17.00/C
100	LM4-64	294.70C	155.00/C	149.00/C
1,000	MT6-14	76.60/C	35.40/C	39.20/C
500	MT5-26	153.00/C	67.00/C	70.00/C
250	MJ6-72	398.00/C	165.00/C	230.00/C
	MT14T-33	20.40/Ea.		10.00/Ea.
	MT6T-32X	6.39/Ea.		4.00/Ea.
	MT6T-40	2.54/Ea.		1.50/Ea.

Bob

RM:mm
cc: C. Hood
A. Leeder
B. Matievich
H. Wilkinson

Supreme Court, U. S.
FILED
MAY 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

MOTION TO DISMISS OR AFFIRM

SLADE GORTON,
Attorney General,

TIMOTHY R. MALONE,
Sr. Assistant Attorney General,
415 General Administration Bldg.
Olympia, WA 98504
Telephone: (206) 753-5528

WILLIAM D. DEXTER,
Assistant Attorney General,
415 General Administration Bldg.
Olympia, WA 98504
Telephone: (206) 753-5515

Attorneys for Appellee.

STATE PRINTING PLANT OLYMPIA, WASHINGTON

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No.....

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

MOTION TO DISMISS OR AFFIRM

SLADE GORTON,
Attorney General,

TIMOTHY R. MALONE,
Sr. Assistant Attorney General,
415 General Administration Bldg.
Olympia, WA 98504
Telephone: (206) 753-5528

WILLIAM D. DEXTER,
Assistant Attorney General,
415 General Administration Bldg.
Olympia, WA 98504
Telephone: (206) 753-5515
Attorneys for Appellee.

INDEX

		Page
	MOTION TO DISMISS OR AFFIRM	1
I	JURISDICTION	2
	QUESTION PRESENTED	2
	CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
	STATEMENT OF THE CASE	3
II	NO SUBSTANTIAL FEDERAL QUESTION IS REPRESENTED	8
	CONCLUSION	16
	ADDENDUM A	17

TABLE OF CASES

American Oil Co. v. Neill, 380 U.S. 451, 14 L.Ed.2d 1, 85 S.Ct. 1130 (1965) 3, 13, 14

B. F. Goodrich Co. v. State, 38 Wn.2d 663, 231 P.2d 325 (1951) 14

General Motors Corp. v. Washington, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964) 2, 8, 9, 13, 14, 15

Miller Bros. Co. v. Maryland, 347 U.S. 340, 98 L.Ed. 744, 74 S.Ct. 535 (1954) 3, 13, 14

Norton Co. v. Department of Revenue, 340 U.S. 534, 95 L.Ed. 517, 71 S.Ct. 377 (1950) 3, 8, 9, 11, 12, 13, 14, 15

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No.....

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein for lack of a substantial federal question or, in the alternative, to affirm the judgment of the Washington State Court of Appeals, Division II, on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED

Is the appellant subject to the Washington business and occupation tax imposed on the privilege of engaging in wholesaling in Washington measured by the gross receipts of its Washington sales (the tax before this court in *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964)) when: appellant conducts activities in Washington through a resident employee and other employees who visit appellant's sole Washington customer in a regular and systematic manner and whose activities (i) are essential, necessary and decisive factors in order for appellant to establish and maintain Washington as a market for its products and (ii) whose activities are directly associated with its Washington wholesale sales as found by the Washington Department of Revenue, the Washington Board of Tax Appeals, the Washington Superior Court and the Washington Court of Appeals?

Essentially, the appellant by this appeal challenges the findings of fact and factual and legal conclusions derived therefrom by the Washington Court of Appeals and in turn the Washington Superior Court, the Washington Board of Tax Appeals and

the appellee. In sum, what appellant asks this court to do is to review the record in this cause and to conclude that Washington does not have taxable nexus based upon the appellant's interpretation of the significance and operative effect of the facts in this cause and its interpretation of the facts in *Norton Co. v. Department of Revenue*, 340 U.S. 534, 95 L.Ed. 517, 71 S.Ct. 377 (1950) in regard to the exempt interstate sales there involved.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved are set forth in the Jurisdictional Statement as Appendices G and H at pages A-24 through A-27.

STATEMENT OF THE CASE

As indicated in the Court of Appeals decision, "The hearings below before both the Board of Tax Appeals and the trial court were conducted on the basis of the deposition of H. Robert Martinson, an employee of plaintiff, various exhibits introduced in connection with the deposition, and the pleadings in the case. There was no 'live testimony.'" (Jur. St., p. A-8)

For this reason, the Court of Appeals found it unnecessary to consider the five findings of fact assigned as error by the appellant. It thus reviewed

[1] In addition to *Norton*, appellant relies on *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 98 L.Ed. 744, 74 S.Ct. 535 (1954) and *American Oil Co. v. Neill*, 380 U.S. 451, 14 L.Ed.2d 1, 85 S.Ct.1130 (1965).

the matter *de novo* on the record before it. The Court of Appeals then recited the following facts and its findings and conclusions in regard thereto:

> "The record discloses that plaintiff, Standard Pressed Steel Company, is a foreign corporation with production facilities located in Jenkintown, Pennsylvania and Santa Ana, California. A significant amount of plaintiff's business involves the manufacture and sale of fasteners (nuts and bolts, generally) to be used in the aerospace industry, and plaintiff's principal customer in this state during the tax years in question was the Boeing Company in Seattle.
>
> "The only employee of Standard Pressed Steel present within the State of Washington over the tax years in question was H. Robert Martinson, a 'sales engineer.' Martinson performed his activities for Standard Pressed Steel out of a portion of a room in his home equipped with a desk, telephone, and a file cabinet.
>
> "Martinson's primary function was to work with Boeing's engineers in the initial phases of aerospace design and construction, and through contact with Boeing engineers inform himself of possible prospective needs of the Boeing Company, and its various subcontractors, for aerospace fasteners. He would then initiate a product engineering request describing in detail the specifications required by Boeing and send this information on to plaintiff's out-of-state offices. After receiving this information from Martinson, plaintiff would make a decision as to whether or not Standard Pressed Steel would attempt to 'qualify' as a Boeing supplier of a particular fastener; that is, Boeing determined who could be a supplier of component parts by qualification tests done at their Seattle facilities. If plaintiff would manufacture sam-

> ple qualification pieces and forward these to Boeing for qualification tests. If the fasteners met the required specifications, Standard Pressed Steel would become an 'approved source' and the Boeing Company would then enter into negotiations with plaintiff's out-of-state offices for purchase of the fasteners.
>
> "The record reflects that all such dealings and negotiations between Boeing and Standard Pressed Steel were carried on directly between Boeing and plaintiff's out-of-state offices. Martinson was bypassed completely, except to the extent that he periodically informed plaintiff of the various subcontractors, purchasing specialists, and control buyers of commodities for which Standard Pressed Steel was an approved source. Martinson had nothing to do with quoting prices, delivery dates, receiving, soliciting, accepting orders, handling shipments, or approving credit. No inventories were kept in this state and all deliveries were made by plaintiff directly through a common carrier.
>
> "The above qualification process consumed approximately 80 to 90 percent of Martinson's time, with the remainder devoted to 'trouble-shooting.' If Boeing experienced any problems in their use of the fasteners supplied by the plaintiff, Martinson's duties were to relay this information to plaintiff's engineers at the out-of-state offices, and there the engineers would work to resolve any difficulties with the product in their laboratories. The engineers would then forward their solution to Martinson, who would present the proposed solution to Boeing's engineers in Seattle. In addition, approximately three days every six weeks Martinson would set up meetings between Boeing engineers and visiting groups of plaintiff's engineers to visit and

discuss engineering problems. (Jur. St. pp. A-9-A-11)

• • •

"Here the record clearly discloses that Standard Pressed Steel Company employed Mr. Martinson as a resident agent within this state to conduct business activities with the Boeing Company, in part out of his Washington residence as an office, so that Standard Pressed Steel could: (1) become aware of which of its products the Boeing Company might be able to use; (2) secure the testing of sample products to qualify the products for sale to the Boeing Company; (3) obtain the engineering designs for such products; (4) resolve problems in the use of the products after receipt and use by the Boeing Company; (5) obtain and retain goodwill and working rapport with Boeing personnel; and (6) secure and update lists of Boeing purchasing specialists or control buyers, and the commodities for which they are responsible, for the use of the personnel at the plaintiff's home office.

"We are of the opinion that the foregoing substantial services constituted a sufficient peculiarly local and distinct taxable incident within the State of Washington such that imposition of the business and occupation tax was not on the privilege of engaging in interstate commerce, but rather on the privilege of doing local business. (Jur. St. pp. A-12-A-13)

• • •

"We are satisfied that the local activities of Mr. Martinson were instrumental in establishing and maintaining the Boeing Company as a market for the sales giving rise to the proceeds by which the state seeks to measure this tax. We therefore conclude that because the gross receipts from plaintiff's sales to the Boeing Company were reasonably related to the local incidents of the tax, imposition of the business and occupation tax here was not offensive to due process." (Jur. St. p. A-15)

The same factual conclusions arrived at by the Court of Appeals was arrived at in turn by the trial court (Jur. St. A-1, A-2).

The lower court's factual findings and conclusions are amply supported by the record in this cause.

There can be little question then that the appellant's activities in the State of Washington giving rise to the liability in question were directly associated with the wholesale sales in question and were maintained by appellant in Washington to establish and hold Washington as a market for its wholesale sales.

This, of course, was the only purpose of the appellant carrying on its activities in this state. If appellant's resident engineer and other employees of appellant were not in Washington for this purpose, they were here for no known business purpose. This activity was continuous, regular and systematic. Through this activity, appellant maintained constant contact with Boeing in Washington to establish and promote its wholesale sales. It cannot be appropriately labeled *de minimis* in a due process of law sense or disassociated from appellant's Boeing sales in a commerce clause sense.

II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

To substantiate its claim that the Court of Appeals opinion is in error and that this cause presents a substantial federal question as a matter of constitutional law, the appellant purports to compare the facts in this cause concerning its wholesaling activities in Washington with the facts pertaining to the exempt retail sales in *Norton v. Department of Revenue*, 340 U.S. 534, 95 L.Ed. 517, 71 S.Ct. 377 (1950) and demonstrate by this comparison that *Norton* specifically supports its claim for tax immunity.

It is the appellee's position that appellant's claim of constitutional immunity is based upon at least three fundamental errors, namely: (1) an incomplete statement and a misconstruction of the significance and operative effect of the facts pertaining to its wholesaling activities in this state; (2) a misstatement of the facts in *Norton* pertaining to Norton's engineers and unsupportable inferences concerning the nature and extent of Norton's engineers' activities in Illinois concerning the exempt Norton sales; and (3) an erroneous interpretation and application of the rules of law established in the *Norton* and *General Motors* decisions.

A comparison of the facts in this case, with the facts in *Norton* pertaining to the exempt Norton

sales, clearly demonstrates that the Court of Appeals did not err by finding that the case at bar is distinguishable from *Norton* and that *General Motors* is controlling precedent.

Without referring to the record in this cause and the specific findings of fact by the Court of Appeals, and without referring to the record or opinion in *Norton*, the appellant's assertion of a substantial federal question is primarily devoted to drawing unsupported factual analogies between the facts of this cause and the facts in *Norton* pertaining to Norton exempt sales. The appellant's characterization of the significance and operative effect of the facts in this cause as compared to the facts in the *Norton* case, *supra*, concerning the exempt *Norton* sales has not only been rejected by the Court of Appeals but also by the trial court and the Board of Tax Appeals. Each of these entities arrived at this result after an independent examination of the record in this cause and *Norton*.

In order to show that the findings of fact and conclusions of law as found by the Board of Tax Appeals and the trial court were supported by the record in this cause, the appellee set forth in its answering brief in the Court of Appeals the material facts in this cause, with references, where applicable, to the deposition (including exhibits) of appellant's Washington based employee Mr. Martinson, and the Board's decision and order and the transcript in this cause. An examination of these factual references,

attached to this brief as Addendum A, shows that the Court of Appeals did not err in making its factual findings and conclusions set out in the appellee's Statement of the Case, *supra*.

Significantly, they support the Court of Appeals opinion that the substantial services that appellant conducted in the state of Washington constituted sufficient peculiarly local and distinct taxable incidents within the state of Washington such that imposition of the business and occupation tax was not on the privilege of engaging in interstate commerce but rather on the privilege of doing a local business. The Court of Appeals was justified on the record in concluding:

> "We are satisfied that the local activities of Mr. Martinson were instrumental in establishing and maintaining the Boeing Company as a market for the sales giving rise to the proceeds by which the state seeks to measure this tax. We therefore conclude that because the gross receipts from plaintiff's sales to the Boeing Company were reasonably related to the local incidents of the tax, imposition of the business and occupation tax here was not offensive to due process." (Opinion of the Court of Appeals, Jur. St., A-15.)[2]

[2]This conclusion is identical in substance with the conclusion found by the trial court and comparable to the conclusion arrived at by the Board of Tax Appeals wherein it stated in regard to its factual findings:

> "We find that these factors were a necessary and vital part in the appellant's ability to gain its market with The Boeing Company in this state in the first instance and to hold its market with Boeing in the second. We find that without these factors, secured through the person of Mr. Martinson, or by some other qualified agent or agency of the appellant in this state, it is very unlikely the appellant could have secured or retained The Boeing Co. as its customer. We find that Mr. Martinson's activities, although not directly concerned with the writing of a sales order, the making of delivery, or the procurement of payment, constituted all of the activities of selling necessarily preliminary to the writing of orders. We find the sales activities of Mr. Martinson to be of such importance that the writing of the orders and subsequent activities of delivery and payment are only the end result of his intensive and extensive activities and the activities of the visiting groups of appellant's engineers in this state."

There is thus absolutely no basis for appellant's claim that "The decision of the Washington Court of Appeals, if left to stand, establishes a new rule of law, to wit: any activity at all by a foreign corporation within the taxing state, regardless of the type, amount and effect of such activity, where a customer is located within the taxing state, constitutes a sufficient nexus with the state to justify the imposition of a tax on the privilege of making those sales." (Jur. St., p. 10)

Furthermore, there is no support for the appellant's argument (Jur. St., p. 15) that its activities in Washington were not materially involved in the wholesale sales used to measure the tax in question.

Nor is there any evidence in the *Norton* record or language of the *Norton* decision that indicate any comparable factual findings or conclusions were involved in *Norton*.

The only reference in this court's decision to Norton's engineers is the following:

> "* * * But no solicitors work the territory out of either the home office or the Chicago branch, although petitioner will supply engineering and technical advice. * * *" (340 U.S. at 537)

The only evidence in the record in the *Norton* case concerning engineering activities was the following testimony set out on page 20 of the transcript of record, concerning activities out of the Chicago office of Norton:

> "* * * we have abrasive engineers who go out to the customer and advise him on technicalities of grinding wheels, what wheels would perform the work, etc.; the engineers go in the field after the order is in; they do not solicit; it is just technical advice; we have no men in the field from the Chicago office taking orders; * * *"

The Supreme Court of Illinois in *Norton Co. v. Department of Revenue*, 405 Ill. 314, 90 N.E.2d 737 (1950) in reference to the engineers stated:

> "There are no salesmen used by appellant, but it does have a group of engineers *available to consult* with prospective customers on their needs. These engineers do not solicit or take orders for goods." (Emphasis added)

There is no evidence or judicial statement in *Norton* that associated the Norton engineers' activities with any exempt sales in *Norton*.

Since this court held in *Norton* that any exempt sales must be disassociated from local activities, this court predicated its decision in *Norton* concerning exempt sales on the premise that the activities of Norton engineers were not significantly or directly associated with the exempt sales. [3] Appellant's state-

[3] For a proper interpretation of the facts and holding in *Norton*, the dissenting opinion of Mr. Justice Clark is instructive. He concluded that the direct sales under the test laid down by the court in *Norton* should also be taxable because the taxpayer had not established that the services rendered by the Chicago office were not decisive factors in establishing and holding the Illinois market for Norton's direct sales. Obviously, a majority of the court thought otherwise.

ment on page 11 of its Jurisdictional Statement that the Norton Co. was performing services within the state in connection with the exempt sales through its corps of engineers is unsupportable by the record and opinion in *Norton*. How and to what extent, if any, these engineers were involved in the exempt sales is not in the *Norton* record.

From the foregoing, it is self-evident that *Norton* facts concerning the exempt sales are readily distinguishable from the facts in the case at bar. As found by the Court of Appeals, the trial court and the Board of Tax Appeals, the appellant's activities in Washington far exceed merely making engineers available to Boeing for consultation. These activities of appellant constitute decisive factors in appellant establishing and maintaining Boeing as a market for its products in Washington. In no sense can they be characterized as *de minimis* as to appellant's wholesale sales to Boeing.

Under these circumstances, it is error for the appellant to argue, on authority of *Norton*, *General Motors*, *Miller Bros. Co. v. Maryland*, *supra*, or *American Oil Co. v. Neill*, *supra*, that its Washington activities are inadequate (i) to establish nexus (Washington jurisdiction to impose its B&O tax on appellant's Washington wholesale activities) or (ii) to permit the tax in question to be measured by gross

receipts derived from Boeing within the purview of the commerce clause limitations.[4] As noted by the Supreme Court of Washington in *B. F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325 (1951):

> "We only interpret the Norton Co. case as holding that such a tax [a business privilege tax] may not be levied upon the proceeds from sales with which the local outlet had nothing to do." (38 Wn.2d 675)

General Motors makes it crystal clear that the B&O tax on wholesaling is valid if the taxpayer's activities in the taxing state are decisive factors in establishing and holding the wholesale market and the taxpayer has not disassociated the wholesale sales in question from these activities. This accords with the express holding in *Norton*. Any so-called *de minimis* rule either as to due process tax jurisdiction or as to the measure of the tax is inapplicable where the taxpayer exercises substantial and decisive wholesaling activities in the state of destination and these activities have not been disassociated from the wholesale sales used as a measure of the tax liability.

In the language of *Norton*:

> "But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some

[4] In *Miller Bros. Co.*, the taxpayer's contact with the taxing state was limited to sporadic in-state deliveries of goods purchased outside the taxing state by the taxpayer. This court there affirmed the rule that due process is met if there is "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." (347 U.S. at 345) In *American Oil Company* no aspect of the taxable transactions took place in the taxing state and the taxable events were completely dissociated from the local business. Significantly, it cited *Norton* as authority for the dissociation test.

> Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." (340 U.S. 537)

In *General Motors*, *supra*, after analyzing the general principles applicable and the facts pertaining to General Motors activities in Washington, the Supreme Court concluded:

> "* * * we can only 'conclude that, in the light of all the evidence, the judgment attributing * * * [the corporation's Washington sales to its local activity] was within the realm of permissible judgment. Petitioner has not established that such services as were rendered * * * [through in-state activity] were not decisive factors in establishing and holding this market.'" (Material quoted by the Supreme Court was from *Norton Co.*, *supra*, at 340 U.S. 538)

Inasmuch as the facts establish that appellant came into the state of Washington to do a local business in connection with its wholesale sales and that this activity is clearly associated with its wholesale sales in this state, *Norton* and *General Motors* are dispositive of this case and establish the correctness of the decision of the Court of Appeals. These cases indicate that there is no merit to either appellant's due process of law or commerce clause arguments.

Nor is there merit to the appellant's argument that the state of origin can tax the wholesale sales in question with the result that these sales are ex-

posed to multiple taxation. Appellant cites no authority and appellee is aware of no authority that establishes that the state of origin has jurisdiction to tax the sales in question. In fact there is no legal or factual foundation laid by the plaintiff concerning this argument.

Neither is there merit to the appellant's contention that the questions are substantial as a matter of public importance. This appeal poses factual issues which have been conclusively and repeatedly resolved against the argument and contentions of the appellant in the proceedings in this cause. It is undoubtedly because of this reason that the Supreme Court of Washington declined to review the decision of the Court of Appeals.

CONCLUSION

The appellant's claim that the Court of Appeals decision is contrary to controlling judicial precedent stems primarily from its failure to properly analyze and give proper weight to the *facts* of this cause. In essence it argues that even though it conducts an intrastate business in this state which was carried on solely in connection with its wholesale sales in question and even though this business was necessary for it to make these wholesale sales, nevertheless it is constitutionally exempt from the B&O tax on wholesaling. No authority supports this novel interpretation of either due process of law or interstate commerce limitations on a state's taxing power.

It is therefore respectfully submitted that this court should decline to take jurisdiction of this matter for lack of a substantial federal question or affirm the decision of the Court of Appeals.

Respectfully submitted,

SLADE GORTON,
Attorney General,

TIMOTHY R. MALONE,
Sr. Assistant Attorney General,

WILLIAM D. DEXTER,
Assistant Attorney General,

Attorneys for Appellee.

ADDENDUM A

The appellant appeals only the imposition of the B&O tax upon its bolt division activities during the period in question. The bolt division is composed of three groups: aerospace, nut and urnbrako (Dep. 20). The appellant, through these groups, manufactures highly specialized industrial and fastener systems (Ex. M, Dep. 21-22, BTA order 1, Tr. 4). The appellant has its manufacturing plants in Santa Ana, California, and in Jenkintown, Pennsylvania—its home office (Dep. 4, BTA order 1, Tr. 4). During the period in question, its principal customer in this state was Boeing in Seattle (Dep. 4-5, BTA order 1, Tr. 4).[1]

The appellant had Mr. Martinson, a resident

[1]Because the appellant treats its other customers in a similar manner but to a lesser degree, the case has been limited by agreement of counsel to the appellant's treatment of Boeing as a customer.

employee, in the state during the period in question. Martinson was a "sales engineer" (Dep. 2, BTA order 1, Tr. 4). His supervisor was the "sales manager" (Dep. 6). His typing was done by the sales manager's secretary (Dep. 6). In training for his job, Martinson spent many weeks in the appellant's plants learning how the products were made and the general technology (Dep. 3). His training at the appellant's plants was continuous—about four trips a year to the plant for about a week or ten days at each plant. (Dep. 4).

In his home Martinson had a desk, file and telephone in a room which he used as his office (Dep. 5, BTA order 2, Tr. 5). His office was significant enough to qualify as such for federal income tax purposes (Dep. 6, BTA order 2, Tr. 5). The telephone was listed under Martinson's home address, but was used by himself and the appellant's visiting personnel for business purposes (Dep. 7-8, BTA order 2, Tr. 5). An answering service was listed under the appellant which received calls for Martinson in the bolt division (Ex. K, Dep. 6-7, BTA order 2, Tr. 5).

On the job Martinson worked directly with Boeing design engineers, Standard's engineers, and project engineers (qualification engineers) (Dep. 4, BTA order 1, Tr. 4). In working with Boeing engineers in the initial phases of aerospace design and construction, Martinson would become aware that Boeing was considering a certain fastener system (Dep. 5, BTA order 1-2, Tr. 4-5). He would initiate a products

engineering request describing in necessary detail Boeing's specifications and would send it to the appellant's chief engineer in Santa Ana, California (Ex. J, Dep. 20, BTA order 1-2, Tr. 4-5). If the appellant wished to qualify for Boeing's list of approved sources, samples were made by the appellant and shipped directly to Boeing for a qualification test (Ex. B, D, Dep. 14-16, BTA order 2, Tr. 5). Martinson would work with Boeing's engineers on qualification problems to make sure the appellant was a qualified source; and he would then notify the appellant if it had indeed so qualified (Ex. B, Dep. 3-14, BTA order 2, Tr. 5). Martinson informed the appellant of the subcontractors and the purchasing specialists or control buyers of each commodity for which it was a qualified source (Ex. A, E-1, Dep. 17-19, BTA order 3, Tr. 6). He supplied the sales manager and other personnel of the appellant with a list of competitive prices at Boeing with explanations as to stock and delivery terms (Ex. A). Martinson neither placed nor accepted orders; therefore, Boeing placed its orders directly with the appellant (Dep. 26, BTA order 2-3, Tr. 5-6). The appellant through its out-of-state offices, negotiated price and delivery date, accepted orders, handled shipments and approved any credit (BTA order 2-3, Tr. 5-6). Martinson received a copy of each sales invoice (Dep. 25, BTA order 2, Tr. 5). Deliveries were made by the appellant directly through a common carrier (Dep. 25, BTA order 2-3,

Tr. 5-6). No inventories were kept in this state (Dep. 24-25).

Once a product was sold, Martinson would work with Boeing's engineers as to any problem with the product (Dep. 10, BTA order 1-3, Tr. 4-6). The problem-solving process, including suggestions or modifications, was handled by Martinson with the appellant in much the same way as the qualification process (Dep. 10-13, BTA order 2, Tr. 5). The qualification process consumed 80 or 90 percent of Martinson's time, while the remainder was consumed by the problem-solving process (Dep. 26-27, BTA order 2, Tr. 5).

In addition to his product-oriented activities, Martinson performed public relation services, such as the arrangement for a hospitality room at a meeting of the Society of Aerospace and Process Engineers, which included Boeing engineers (Ex. C, Dep. 15, BTA order 2, Tr. 5). All expenses were sent directly to the home office (Dep. 15, 25-26). Martinson would also set up meetings between Boeing engineers and visiting groups of engineers of the appellant (Dep. 9, BTA order 2-3, Tr. 5-6). These visiting engineers were application engineers, coding engineers and general engineers who visit about three days every six weeks to discuss problems relating to the appellant and Martinson's activities with Boeing (Dep. 8-9, BTA order 2-3, Tr. 5-6).

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

APPELLANT'S OPENING BRIEF

KENNETH L. CORNELL
and HAROLD S. FARDAL
KELLER, ROHRBACK, WALDO,
MOREN & HISCOCK
Attorneys for Appellant

Office and Post Office Address:
1220 IBM Building
Seattle, Wa. 98101
Telephone (206) 623-1900

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes and Constitutional Provisions 4

Statement of the Case 4

Summary of Argument 8

First Question — Due Process 8

Second Question — Interstate Commerce 10

Argument 11

First Question — Due Process 11

Second Question — Commerce Clause 24

Conclusion 31

Appendices:

Appendix A A-1

Appendix B A-4

TABLES OF AUTHORITY

Table of Cases

American Oil Co. v. Neill, 380 U.S. 451 ..... 12, 21

B. F. Goodrich Co. v. State, 38 Wn.2d 663, 281 P.2d 325 (1951) 14, 19, 20

Eli Lily & Co. v. Sav-on Drugs, 366 U.S. 276 13

Field Enterprises, Inc. v. Washington, 47 Wn.2d 852, *aff'd*, 353 U.S. 806 14

Page

Freeman v. Hewit, 329 U.S. 249 .....10, 11, 24, 27, 29, 32

General Motors Corp. v. Washington, 60 Wn.2d 862, 376 P.2d 843, *aff'd*, 377 U.S. 436 ....8, 12, 13, 20, 22, 29, 31

Gwin, White & Prince Inc. v. Henneford, 305 U.S. 434 .....10, 23-24, 29

Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 .....10, 23, 32

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 27

McLeod v. J. E. Dilworth, 322 U.S. 327 (1944) 10, 12, 22, 24, 32

Miller Bros. Co. v. Maryland, 347 U.S. 340 .....8, 10, 12, 24, 25, 27, 31, 32

National Bellas Hesse v. Department of Revenue, 386 U.S. 753 .....11, 24

Nippert v. City of Richmond, 327 U.S. 416 10

Northwestern States Portland Cement Co. v. Minn., 358 U.S. 450 (1959) 8, 12

Norton Co. v. Department of Revenue, 340 U.S. 534 (1950) .....8-9, 10, 12, 13, 14, 15, 16, *et seq.*

Robbins v. Shelby County Taxing District, 120 U.S. 489 .....10, 24

Spector Motor Service, Inc. v. O'Conner, 340 U.S. 602 24-25

Wisconsin v. J. C. Penney Co., 311 U.S. 435 .....10, 23, 32

Constitutional Provisions

U.S. Const. art. I, § 18, cl. 3 4

U.S. Const. amend. XIV 4, 11

Statutes

Page

RCW Ch. 82.04 4

RCW 82.04.040 4

.060 4

.070 4

.220 .....4, 31

.270 .....4, 31

.500 4

62 Stat. 929, 28 U.S.C. § 1257(2) 2

63 Stat. 104, 28 U.S.C. § 2101(c) 2

Other Authority

Rule 11(3) 2

Rule 13 2

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

APPELLANT'S OPENING BRIEF

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Washington, Division II, (A. 33) is reported at 10 Wn. App. 45, 516 P.2d 1043 (1973).

JURISDICTION

On December 3, 1973, the Court of Appeals of the State of Washington, Division II, filed its decision. (A. 33) Appellant thereafter, on December 20, 1973, filed its Petition for Rehearing, (A. 43) and that same court entered, on January 3, 1974, its Order Denying Appellant's Petition for

Rehearing. (A. 46) Appellant then addressed its Petition for Review (A. 47) to the Washington Supreme Court, the highest state court in which decision could be had, and that court, without hearing argument, entered its Order on February 20, 1974, denying appellant's petition for review. The decision of the Court of Appeals thereby became a final judgment on February 21, 1974. (A. 72) On March 14, 1974, Notice of Appeal (A. 74) to this court was filed with the Washington Court of Appeals, Division II, pursuant to Rule 11(3) of this court and 63 Stat. 104, 28 U.S.C. §2101(c). On May 13, 1974, the Jurisdictional Statement was filed and the case docketed in this court pursuant to Rule 13. Probable jurisdiction was noted on June 17, 1974, ... U.S. ..... The jurisdiction of this court rests on 62 Stat. 929, 28 U.S.C. §1257(2).

QUESTIONS PRESENTED[1]

1. Is a Washington tax on the privilege of engaging in the business of making sales at wholesale within said state repugnant to the due process clause of the United States Constitution when applied to gross receipts from sales of goods manufactured and sold wholly without the state by a foreign corporation to a customer located within the state, when the seller's sole-in-state activity consists of the activities of one resident engineer who makes himself aware of the customer's possible potential needs and passes this information to out-of-state offices, and who offers some engineering assistance to the customer in the use of the product, but who does not take or accept orders and who is not involved at all with sales negotiations, delivery dates or delivery problems, credit checks, or any other aspect of the sale transaction?

1. Repeated verbatim from Jurisdictional Statement.

Subsidiary to this question are the following:

a. Is such a tax an unwarranted extension of state power beyond its boundaries, so that traditional notions of fair play and substantial justice are offended?

b. Is the imposition of such a tax, a tax on de minimus activities and mere entry into the state?

2. Is the Washington tax on the privilege of engaging in the business of making sales at wholesale within said state repugnant to the commerce clause of the United States Constitution, when applied to the gross receipts from sales of goods manufactured and sold wholly without the state by a foreign corporation to a customer located within the state, when the seller's sole in-state activity consists of the activities of one resident engineer who makes himself aware of the customer's possible potential needs and passes this information on to out-of-state offices and who offers some engineering assistance to the customer in the use of the product, but who does not take or accept orders, and who is not involved at all with sales negotiations, delivery dates or problems, credit checks, or any other aspect of the sales transaction?

Subsidiary to this question are the following:

a. Does the commerce clause prohibit such a risk of multiple taxation where no sales activity of any kind occurs within the taxing state, where the necessary and material incidents of the sale occur outside of the taxing state?

b. Has the state afforded such a taxpayer sufficient protection and benefits to justify the exaction of the tax in return for said benefits?

STATUTES AND CONSTITUTIONAL PROVISIONS

The tax here involved is imposed by Title 82, Chapter 82.04 of the Revised Code of Washington (RCW). Pertinent portions of RCW Sections 82.04.040, 82.04.060, 82.04-070, 82.04.220, 82.04.270, and 82.04.500 are set forth in Appendix A hereto (infra pages A-1—A-3).

Article I, §8, cl. 3 of the Constitution of the United States (commerce clause) and the due process clause of the 14th Amendment to that Constitution are set forth in Appendix B hereto (infra page A-4).

STATEMENT OF THE CASE

This is an appeal by Standard Pressed Steel Co. from a final judgment of the Washington Court of Appeals sustaining assessments of the Washington business and occupation tax purportedly imposed on the privilege of "engaging within the state in the business of making sales at wholesale," RCW 82.04.270. The tax was levied on the unapportioned gross receipts of Standard Pressed Steel Co. resulting from its sales of aerospace fasteners (nuts and bolts generally) to Washington customers, sold wholly without the State of Washington and shipped to Washington customers, principally Boeing, by common carrier, f.o.b.

The hearings below were all conducted solely on oral argument with no live evidence being presented. Rather, the entire evidence in the case is in written form, consisting of a relatively short deposition of Robert Martinson (A. 75 *et seq.*). There are therefore no issues of credibility or demeanor, competency of witnesses, or the weighing or reconciling of conflicting testimony. This court is therefore in as good a position as the administrative bodies and

courts below to exercise its independent judgment on the evidence. This is particularly so where the dispute involves constitutional issues of law, namely, whether the imposition of the business and occupation tax on appellant is constitutionally justified. The courts and not administrative agencies possess the necessary expertise to decide questions of law such as those presented herein. Appellant therefore submits that this court, like the Washington Court of Appeals below, should exercise its independent judgment in its review of the record, and this court should not be deemed bound in any way by the findings and conclusions below.

Standard Pressed Steel Co. is a Delaware corporation with production facilities located in Jenkintown, Pennsylvania, and Santa Ana, California. (A. 77) A significant portion of appellant's business involves the manufacture and sale of highly machined fasteners for use in the aerospace industry, and, therefore, Standard Pressed Steel on occasion supplies fasteners to the Washington facilities of the Boeing Company. (A. 78, 90, 91)

The only employee of Standard Pressed Steel present within the State of Washington during the tax years in question was H. Robert Martinson, (A. 76, 80) an engineer, who at the time of his deposition in March of 1971, had been terminated by the company and who has not been replaced. (A. 76) Because Standard Pressed Steel's present operation in the State of Washington is different from that during the tax years in question in that there is presently no employee present within the state, the statement of the case will be in the past tense.

Martinson was paid a salary for his services, (A. 93) and performed his activities for appellant out of a portion

of one room in his home equipped with a desk, telephone and file cabinet. (A. 78) Appellant had no formal office in Washington (A. 78-80) and likewise did not maintain any warehouse, inventory, or outlet of any kind in the state. (A. 80, 93) It is undisputed that were it not for the activities of Martinson, appellant would not be subject to the tax.

Martinson's primary function was to attempt to inform himself, through contacts with Boeing Company qualification engineers, of possible needs of the Boeing Company for aerospace fasteners, and to pass this information on to appellant's out-of-state offices, describing the specifications required by the Boeing Company. (A. 76, 89, 94) There is nothing in the record to show that Martinson in anyway "created" a need for appellant's fasteners, or in any way promoted or "sold" appellant's product. Martinson's sole contact with Boeing was with Boeing qualification "project" engineers who could not purchase appellant's product even if they wanted to. (A. 77, 78)

As Martinson would receive information concerning possible needs for appellant's product as found in Boeing plans and drawings, Martinson would forward this information to appellant's out-of-state offices. (A. 76, 89, 94) After receiving this information from Martinson, Standard Pressed Steel personnel in Pennsylvania or California would make the decision as to whether or not appellant would even attempt to "qualify" as a supplier, either to Boeing or Boeing's sub-contractors. (A. 89) If the decision were to attempt to qualify, the company would manufacture sample qualification pieces and forward these directly to Boeing for qualification tests. (A. 85, 89) If the fasteners met the required specifications, Standard Pressed Steel was considered to be an "approved" source, and negotiations possibly leading to a sale would ensue between the Boeing Company and appellant's personnel located in either Pennsylvania or California. (A. 76, 77, 88, 89, 93, 94) Of course, competing aerospace fastener companies would also attempt to qualify as approved sources with the hope of ultimate sales of their fasteners.

All dealings in connection with possible sales and negotiations leading up to sales were carried on directly between the Boeing Company and appellant's sales personnel located in Pennsylvania or California. (A. 88, 89, 93, 94) Martinson was not in any way involved in these negotiations, either directly or indirectly, and was not consulted in any way, but rather was by-passed completely. Martinson had nothing to do with quoting, handling or relaying prices or delivery dates, handling or coordinating shipments, approving credit, and he did not solicit, accept or forward any orders for appellant's products. (A. 88, 89, 93, 94) All deliveries were made by appellant through a common carrier. If a problem developed relative to some aspect of the sale, Boeing did not call on Martinson but rather had to deal with appellant's personnel in either Pennsylvania or California. (A. 88, 89, 93, 94)

In addition to his forwarding information concerning Boeing's possible needs, which consumed the great majority of his time, Martinson also devoted some time (approximately 15%) to "troubleshooting". (A. 82-84, 94) If Boeing experienced any problems in the use of the product, Martinson would relay this information to appellant's engineering personnel in either California or

Pennsylvania, who would work to resolve the difficulties. The engineers would then forward this solution to Martinson, who would in turn present the proposed solution to Boeing engineers. (A. 82-89)

In addition to the above, approximately every six weeks or so Martinson would arrange hospitality meetings, lasting no more than three days, where appellant's engineers from out-of-state offices and Boeing engineers would meet and discuss engineering problems in the use of the product. (A. 81) Martinson would also on occasion inform appellant of the identity of various sub-contractors, purchasing specialists and control buyers of commodities, for which Standard Pressed Steel was an approved source. (A. 87-89) Martinson did not have any contact with such personnel, however. (A. 77, 78)

Standard Pressed Steel under protest has paid the tax claimed by the state to be due, and the parties have stipulated that the total amount of business and occupation taxes and interest subject to refund in the event petitioner is the prevailing party in this appeal is the sum of $33,-444.91.

SUMMARY OF ARGUMENT

First Question—Due Process.

It is well established that local taxation of a foreign corporation engaged in interstate commerce is justified only where the corporation is engaged in *substantial* income-producing activity in the taxing state. *Northwestern States Portland Cement Co. v. Minn.*, 358 U.S. 450; *Miller Bros. Co. v. Maryland*, 347 U.S. 340; *General Motors Corp. v. Washington*, 377 U.S. 436; and *Norton Co. v. Department of Revenue*, 340 U.S. 534. This is especially true in the case of a privilege tax on unapportioned gross receipts.

A review of the record clearly shows that appellant is not engaged in substantial income-producing activity in the taxing state. There is no precedent for imposing a tax on the privilege of conducting business within a state, measured by unapportioned gross receipts, where the in-state activities are so thin and inconsequential as those performed by appellant's engineer.

The court below nevertheless determined that appellant's instate activity was decisive in establishing and maintaining a Washington market. The conflict with *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1950) is clear. In *Norton*, as to that class of sales held by this court to be exempt from the Illinois gross receipts tax, the Norton Co. was performing services within the state in connection with those sales through its corps of resident engineers who did not take or accept orders, but who did consult with customers as to their possible needs, and who offered engineering advice and assistance in the use of the product. Similarly, appellant's only in-state activity in connection with the sales in question is through its engineer who consults with the Boeing Company as to its possible need for the products, and who offers some engineering assistance and advice on the use of the products. On the authority of *Norton Co. v. Department of Revenue, supra*, such activities are not decisive factors in the sales and are not a sufficient nexus to support the imposition of a gross receipts tax on the privilege of making such sales.

In addition, in the present case, where the material ac-

tivities in connection with the sales occurred outside of the taxing state, the state is attempting to impose a tax on activities which occur beyond its borders, in violation of due process. *McLeod v. J. E. Dilworth*, 322 U.S. 327 (1944). The tax further goes far beyond the permissible bonds of due process, because its measure bears no fiscal relation to the protection, opportunities and benefits given by the state. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435. A tax which is not properly apportioned to business done within the jurisdiction denies due process. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123.

Second Question—Interstate Commerce.

The decision below held in part that the imposition of the tax was not repugnant to the commerce clause. Once again, the conflict with *Norton Co. v. Department of Revenue, supra*, is clear. In that case the court held that sales such as exist in the present case are so clearly interstate in character as to be exempt from the Illinois gross receipts tax. Like the Norton Co. on its exempt sales, appellant has not elected to localize itself in the Washington market, thereby gaining the advantages of a local business. Rather, the appellant, as seller, is seen by the customer as remote and inaccessible. Appellant likewise has not received benefits from the taxing state any more substantial than those received by taxpayers in such cases as *Miller Bros. v. Maryland*, 347 U.S. 340; *Norton Co. v. Department of Revenue*, 340 U.S. 534 (on exempt sales); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327; *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434; *Robbins v. Shelby County Taxing District*, 120 U.S. 489; *Nippert v. City of Richmond*, 327 U.S. 416; *Freeman v. Hewit*, 329 U.S. 249; and

National Bellas Hesse v. Department of Revenue, 386 U.S. 753, and in all of these cases the imposition of the tax was struck down.

In this case, the material incidents of the transaction occur in either Pennsylvania or California, and the taxing situs of the privilege of conducting the transaction is in Pennsylvania or California. While these states do not have such a privilege tax at the present time, the risk of repeated exaction of the tax is clear. To rule that the question of multiple taxation is not properly before this court would subject the appellant to the vagaries and whims of various state legislatures. Appellant submits it is this very type of multiple exposure which the commerce clause was designed to prevent. *Freeman v. Hewit*, 329 U.S. 249.

If the decision of the court of Appeals below is upheld, it will be to the detriment of the national market, and it will encourage interstate businesses either to become for all intents and purposes domestic businesses, or to sever their already thin contacts with the taxing state so as to avoid taxation entirely, which places interstate commerce at a further competitive disadvantage.

ARGUMENT

First Question—Due Process.

An examination of the principles of the commerce clause and the due process clause of the Fourteenth Amendment as applied to the ability of a state to tax foreign corporations engaged in activities within the state, reveals an interplay and overlap of the two concepts in application and analysis. As a result, much of the argument herein under the due process heading applies to the argument presented

under the commerce clause heading and vice versa. For this reason, portions of the argument presented may be repeated in measure under both headings.

The test of the power of a state to impose a tax on a concern operating in interestate commerce is to determine whether the tax is so closely related to the local activities of the concern as to form some definite link, some minimum connection, between the state and the person, property or transaction sought to be taxed. *Miller Bros. Co. v. Maryland,* 347 U.S. 340. In applying this test, the court has directed its inquiry to the amount and effect of the local activities and has required that the local activities be substantial in relation to the incidence of the tax and in some way promote sales, *e.g., Miller Bros. Co. v. Maryland,* 347 U.S. 340, where the court struck down the imposition of a sales tax even though there were deliveries of purchases into the taxing state and mailing of notices of special sales to residents of the taxing state; *American Oil Co. v. Neill,* 380 U.S. 451, where it was held that it was constitutionally impermissible to suppose that the interstate activities of the appellant contributed in any way to the transaction in question where every material phase of the sales transaction occurred outside of the state; *McLeod v. J. E. Dilworth Co.* 322 U.S. 327 (1944), where the local sales tax was held invalid as applied to goods shipped f.o.b. into state by an out-of-state manufacturer, and where sales orders were solicited by "drummers", subject to acceptance at the head office; *Norton Co. v. Department of Revenue,* 340 U.S. 534, where the court held a gross receipts privilege tax invalid where the only interstate activity associated with those sales was conducted by a group of engineers who consulted with customers as to their needs and who

offered technical assistance and advice in the use of the product; *General Motors Corp. v. Washington, supra,* where the court expressly found substantial and extensive promotional activity and an in-state bundle of corporate activity enmeshed in an admittedly local maze of taxable business and further observed that in-state activity of a de minimus nature, constituting mere entry into the state, is not a sufficient nexus; and *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959), where the court stated that where a taxpayer is not a domiciliary of a state, that state can tax the net income of a foreign business only when the taxpayer engages in substantial local activities. The Washington Supreme Court in *General Motors v. Washington,* 60 Wn.2d 862, 376 P.2d 843, *aff'd* 377 U.S. 436, stated that taxation of interstate concerns which performed de minimus activities within the state would be both unreasonable and unjust.

As is the case with any application of due process, the court's interpretation of due process varies with the nature of the particular tax in question. *Eli Lily & Co. v. Sav-on Drugs,* 366 U.S. 276. In *Norton* the court observed that nexus is more easily established in a sale or use tax context because of the impact of the taxes on the local buyer-user, and cases involving those taxes are not controlling where an unapportioned tax falls on the vendor, such as exists in the case at bar. As to the amount and effect of contacts necessary to establish a constitutional nexus in the situation of a privilege tax measured by gross receipts, the two cases most clearly in point are *Norton Co. v. Department of Revenue,* 340 U.S. 534, and *General Motors Corp. v. Washington,* 377 U.S. 436.

That appellant's in-state activity is not sufficient to establish a constitutional nexus with the taxing power of the state was established in *Norton*, which is a case remarkably similar to the case at bar, and is controlling authority in support of appellant.[2] In *Norton* the court held that where a non-resident manufacturer maintains an in-state office staffed with consulting liaison engineers who do not solicit or take orders, the activities are not sufficient to justify on due process grounds the imposition of the Illinois occupation tax measured by gross sales.

The facts in *Norton* were that the Norton Company was a producer of industrial grinding wheels and abrasive materials used in manufacturing. The Norton Company maintained a large sales office and warehouse in Chicago and made over the counter retail sales to customers, which the Norton Company admitted were subject to the state business and occupation tax. The Norton Company did, however, challenge the imposition of the occupation tax measured by gross sales to Illinois customers as to four different classes of sales, alleging in part that the in-state activities associated with those sales were not sufficient to justify the tax. The taxes on three of the four classes of sales in question were upheld as constitutional. As to those direct sales held to be exempt and nontaxable, however, the local activities were held to be de minimus, constituting mere entry at best, and not decisive factors in establishing and maintaining the Illinois market. The local activities involved with these direct sales were performed by

2. See *B. F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325 (1951), where the Washington Supreme Court, in considering similar challenges to the tax question, expressly stated that *Norton* was controlling authority, and *Field Enterprises, Inc. v. Washington*, 47 Wn.2d 852, aff'd 353 U.S. 806, where the court deemed *Norton* to be controlling authority.

Norton's corp of engineers, who did not take or solicit orders, but who did consult with customers as to their needs,[3] and who offered technical engineering assistance and advice in the use of the product,[4] all of which activity was held to be an insufficient local contact, such that taxation would be unjust and unfair.

As in the case of the Norton Company engineers, in the case at bar the only in-state activity involved is that of appellant's one engineer who did not take or solicit orders and who offered a measure of technical engineering assistance and advice in the "trouble-shooting" process, and did not consult with Boeing as to their future needs, but rather passed on information of which he became aware concerning possible future needs of Boeing. Based on the facts of the case at bar, it cannot be said that appellant performed local services any more essential to the ultimate sale or performed services any more significant than did the Norton engineers on the exempt sales. Nevertheless, the Washington Court of Appeals determined that Martinson's activity was a "sufficient peculiarly localized" distinctly taxable incident within the State of Washington, in that his actvitiy enabled Standard Pressed Steel to:

> "(1) become aware of which of its products the Boeing Company might be able to use; (2) secure the testing of sample products to qualify the products for sale to the Boeing Company;(3) obtain the engineering designs for such products; (4) resolve problems in the use of the products after receipt and use by the Boeing Company; (5) obtain and retain goodwill and working rapport with Boeing personnel; and (6) secure and update lists of Boeing purchasing specialists

3. *Norton Co. v. Department of Revenue*, 405 Ill. 314, 90 N.E.2d 737 (1950).

4. *Norton Co. v. Department of Revenue*, 340 U.S. 537.

> or control buyers, and the commodities for which they are responsible, for the use of the personnel at the plaintiff's home office." (A. 37)

The conclusion that Martinson's activity was sufficient local taxable incident is clearly in conflict with *Norton*. A review of the record show that Martinson's primary duties were the same as those of the Norton engineers. Both Martinson and the Norton engineers were concerned with the prospective needs of customers. Both Martinson and the Norton engineers supplied a measure of engineering and technical advice in the use of their respective products. Certainly, the Norton engineers were concerned with obtaining and retaining good will and rapport with their company's customers, and their efforts were performed for the purpose of aiding the direct sales held to be non-taxable.

The circumstances of the case at bar present an even clearer case for exemption from taxation than that faced by the court in *Norton*. Appellant is not conducting a local outlet of any kind within the state requiring appellant to show the transactions as disassociated from the local business. In addition, the activities of the Norton engineers in consulting with customers as to needs constitutes activity of a more substantial nature than the activity of appellant's engineers in merely becoming aware of Boeing's possible needs. Implicit in the consultation of Norton engineers with customers is an element of persuasion, inducement or salesmanship of the product, which factors are missing in Martinson's activity. As stated previously, Martinson merely reviewed design drawings and specifications to become aware of Boeing's "self-induced" or "self-perceived" possible future needs. Martinson did not in any

way create the need or attempt to influence Boeing to use appellant's products. Boeing's need for fasteners was rather created independent of Martinson or Standard Press Steel. Martinson was placed in Washington therefore primarily not to "benefit" the customer or the Boeing Company by presenting or promoting appellant's products, but rather to give appellant as much advance lead time as possible in the qualification process. It is true that Martinson did spend a small percentage of his time in the trouble-shooting process, but as observed in *Norton*, the Norton engineers in addition to consultation as to needs, likewise offered technical engineering assistance and advice in the use of the product.

Clearly on the authority of *Norton*, the State of Washington cannot constitutionally subject appellant to the state business and occupation tax. If an out-of-state company, with an extensive local sales office cannot be taxed on its direct orders to the manufacturer, where the company maintains a corps of liason engineers to consult with the customers who order direct, clearly under the facts of the case at bar, where there is no local sales activity of any kind, no local outlet, all sales being of the direct order type, appellant cannot constitutionally be subject to the business and occupation tax.

Appellee has consistently throughout the course of this case taken the position that the Norton Company engineers did not perform activities associated with tax exempt sales. A careful reading of the *Norton* opinion shows this contention to be without merit. As noted previously the Norton engineers consulted with prospective customers as to their needs and offered technical engineering assist-

ance and advice in the use of the Norton products. Picture these engineers in their office, available to consult with a customer. A customer, or prospective customer, contacts one of these engineers with a problem or a question concerning a Norton product. Contrary to appellee's interpretation of *Norton*, it is certainly not reasonable to assume that prior to consulting with the customer the engineer would inquire as to whether the customer was placing his order direct to Massachusetts and receiving shipment directly back, in which case the engineer would decline to render services, or whether the customer expected the help of the Chicago outlet on some aspect of the sale, and, if so, to what extent. And what would the engineer do if the customer had not yet decided how the order would be placed? And further, such an inquiry would only be relevant after the *Norton* decision in any event, unless appellee would have us assume further that the Norton engineers were able to predict the result in *Norton*. In addition there is nothing in the *Norton* opinion which states or implies that these engineers were not offering engineering assistance to customers involved in direct sales. On the contrary, the *Norton* opinion describes the engineers as providing engineering assistance without limitation. If the Norton engineers did not provide engineering assistance to a certain class of customers, such a critical fact would certainly have been mentioned in the opinion.

In spite of the clear support the *Norton* decision provides for appellant's position in this case, the Washington Court of Appeals apparently concluded that *Norton* did not compel a judgment in favor of appellant and distinguished *Norton* on the basis that implicit in the *Norton* decision was the conclusion that the activities of the local Chicago

office, including the activities of the engineers, were not decisive factors in holding or establishing the market reflected by the direct interstate sales, while Martinson's activity in the State of Washington was instrumental in establishing and maintaining the Boeing Company as a market. What the Court of Appeals overlooked in its opinion is that Martinson's activities are substantially the same activities as were performed by the Norton engineers. If the services of the Norton engineers were held to be not decisive factors in holding the market on direct sales, it naturally follows that the activities of Martinson must likewise be held to be insufficient and non-decisive factors in establishing and maintaining the Boeing Company as a market.

The incorrect legal result reached by the Washington Court of Appeals results in part from a misreading of the *Norton* opinion, stemming from the decision of the Washington Supreme Court in *B. F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325 (1951). As stated by the Court of Appeals, (A. 40):

> "The *Norton* decision was construed by our State Supreme Court as follows:
>
> > 'We only interpret the *Norton Co.* case as holding that such a tax may not be levied upon the proceeds from sales with which the local outlet had nothing to do'.
>
> "*B. F. Goodrich Co. v. State*, 38 Wn.2d 663, 675, 231 P.2d 325 (1951)."

In *Goodrich*, the Washington Supreme Court obviously disagreed with the result in *Norton* on the non-taxable sales, and reluctantly applied the case as sparingly as possible. Instead of reading the opinion as resting on the

proposition that the conducting of an intrastate business was the taxable event and that the taxpayer's interstate business was taxable only to the extent that it could not be separated from the local business, the court declared that *Norton* permitted a state to impose its gross income tax on all interstate commerce except where there was no in-state activity at all associated with sales, and held taxable every transaction that had any contact, however tenuous, with an in-state office. The *Goodrich* opinion set the tone for all subsequent judicial rulings in the State of Washington on such matters, and clearly influenced the Court of Appeals in its evaluation of the activities of Standard Pressed Steel in the State of Washington. Such on interpretation of the law, however, finds no support in the decisions of this court.

The later case of *General Motors Corp. v. Washington*, 377 U.S. 436 does not weaken the holding of *Norton*, but rather reaffirms the principles of *Norton*, and supports appellant's position herein.

In *General Motors*, the court considered the activities of one of the largest corporations in the world, with the corporation conducting a maze of in-state activities which admittedly were subject to the taxing power of the state. As to the challenged classes of sales, the activities of the corporation in the state covered several pages of the court's opinion, and the court concluded:

> "That the tax is levied on the incidence of a substantial local business in Washington." (377 U.S. at p. 439).

As to the challenged classes of sales, the facts showed that during the tax period involved, the Chevrolet, Oldsmobile, and Pontiac Divisions had an average of twenty em-

ployees resident or principally employed in Washington, with General Motors Parts Division employing about twenty more. These employees were in addition to other employees working out of the Portland Zone Office, who would regularly and systematically visit dealers to secure and maintain a quality dealer organization, with the aim of achieving better sales results. These employees would advise dealers on divisional sales policies and promotional and training plans to increase sales. Projections of orders of estimated needs were prepared by General Motors personnel, which projections were purchase orders for all practical purposes. General Motors' service representatives advised dealers on methods of increasing service efficiency. The zone used car managers assisted Washington dealers in the disposition of used cars through appropriate display and reconditioning. The Parts Division had a warehouse and inventory in Seattle. Based on these actions and others not mentioned herein, the court correctly concluded that the corporation was conducting extensive and substantial promotional and service efforts. The activities of General Motors in Washington are in sharp contrast to appellant's one engineer whose basic activities did not in any way promote sales or offer customer benefits, and whose activity was similar to the activity of the Norton engineers. There is no possible justification for equating the amount and effect of Martinson's activities with the bundle of corporate activities and maze of local connections of General Motors in the State of Washington. It is clear that General Motors had established and was operating a local business and was not seen by customers as remote and inaccessible. As stated in *American Oil Co. v. Neill*, 380 U.S. 451, where a corporation pursuant to permission given, enters a state and estab-

lishes a local outlet, the imposition of a tax will not violate due process. It cannot be said, however, that appellant had established a local outlet within the meaning of *Norton* and *General Motors*, through which appellant has gained the advantages of a local business. Appellant rather has approached the market in a manner in which the Washington customer views appellant as remote and distant with the customer having to deal with appellant's personnel located in distant states.

The activities of appellant which are sought to be taxed are the Washington activities involved in the wholesale sales to Boeing. The record clearly shows however that all necessary incidents to the sales were performed by appellant directly from its offices located in either Pennsylvania or California. The court has never sustained a tax on the privilege of conducting business within a state where the in-state activities are so thin and inconsequential as those performed by appellant's engineer. When compared with the incidence of the sales which occurred outside the state, the activity on which the tax is based is de minimus indeed. To uphold the tax assessment on appellant is to impose a tax on activities which occur beyond the borders of the state. This is a violation of due process. *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327. It is clearly unfair and unjust to require appellant, who has elected to carry on its business in interstate commerce with all of its essential and material activities in connection with the Washington sales taking place outside of the boundaries of the state with only incidental and de minimus activity within the State of Washington, to pay the same tax that would be payable if all of its activity in connection with the Boeing sales occurred in Washington.

It is also a violation of due process for a state to impose a tax, the measure of which does not bear a reasonable fiscal relationship to the protection and benefits conferred by the state on the intrastate activities which give rise to the tax. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435. In other words, this tax violates due process as it is not properly apportioned to the business done in the taxing jurisdiction. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123. In that case the North Carolina statute imposed a tax measured by a portion of net income, but the apportionment formula attributed 80% of the taxpayer's income to North Carolina, whereas it appeared that in fact no more than 17% actually arose there. The result was unconstitutional. The result here is much more aggravated. The tax applies to 100% of receipts, and while appellant has no precise measure of the amount attributable to in-state activities, it should be obvious that it cannot be other than de minimus.

In the present case the Washington Court of Appeals has erred, not only in finding a "taxable incident" but in holding that there being such an incident, the measure of the tax based upon that incident is constitutional. In *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, involving this very tax, this court in holding to the contrary, stated at page 438 that:

> "While appellant is engaged in business within the state, and the state courts have sustained the taxes laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collec-

> tions are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume."

It might be argued however, that certainly Standard Pressed Steel has received benefits from the state for which the state can exact a fair return. While the tax in question does not allow for a fair return but rather is unapportioned, it should be clear that the State of Washington in any event has not given anything to Standard Pressed Steel for which it can ask return, any more than the various states involved provided benefits and protection to the taxpayer in such cases as *Miller Bros. v. Maryland*, 374 U.S. 340; *Norton Co. v. Department of Revenue*, 340 U.S. 534 (on the exempt sales); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327; *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434; *Robbins v. Shelby County Taxing District*, 120 U.S. 489; *Nippert v. City of Richmond*, 327 U.S. 416; *Freeman v. Hewit*, 329 U.S. 249; and *National Bellas Hesse v. Department of Revenue*, 386 U.S. 753, and in all of these cases the imposition of the state tax was struck down.

Second Question—Commerce Clause

While a concern operating in interstate commerce might have sufficient contacts with the state to justify the imposition of a tax on a due process basis, the strictures of the Constitution do not end there, as it is settled that a state may not tax the privilege of engaging in interstate commerce, *Spector Motor Service, Inc. v. O'Conner*, 340 U.S.

602. In this regard it is settled for a state to levy a tax upon a business operating in interstate commerce, the circumstances must be such that the taxpayer has elected to operate and compete as a local business with the competitive advantage of a local business. *Miller Bros. v. Maryland*, 374 U.S. 340. And in *Norton Co. v. Department of Revenue*, 340 U.S. 534 the court declared at page 534:

> "Although the concern does not, by engaging in business within the state, lose its right to do interstate business with tax immunity, *Cooney v. Mountain States Telegraph Co.*, 294 U.S. 384, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business."

That the imposition of the tax in the present case is in violation of the commerce clause as being a tax on the privilege of conducting a purely interstate business was established in *Norton Co. v. Department of Revenue*, 340 U.S. 534, where it was held that direct sales were so clearly interstate in character as to be non-taxable as the only in-state activity was that of a corps of resident engineers who consulted to customers as to needs and who offered engineering assistance and advice. Similarly, in the case at bar where appellant's activities were the same or sufficiently similar to the activities of the Norton engineers, appellant's sales are clearly interstate in character, such that the imposition of the Washington business and occupation tax constitutes a tax on the privilege of engaging in interstate commerce.

The basis of the court's holding in *Norton* was that the amount and effect of the activities of the Norton Co. on the three taxable classes of sales were such that the company had elected to localize itself in the Illinois market

with the advantages of an interstate business. In such a case where a business allegedly operating in interstate commerce has elected to compete on much the same basis as a local intrastate business with substantial local connections and with the competitive advantages which go along with a local business, it is not within the contemplation of the commerce clause, and it would be unreasonable, to allow such a business to hold the immunity of an interstate business. On the direct exempt sales however, where the only activity was that of the engineers, the business was not competing on the level of a local business and did not have the advantages of a local business. From a competitive point of view, such an operation has competitive disadvantages as the trade is likely to view the seller as remote and inaccessible. The seller cannot supply items from a local outlet, communication is more difficult, freight and shipping are more difficult, problems in general are more difficult to solve, and freight costs are generally greater for the customer. This is exactly the type of operation which the commerce clause protects by providing an immunity from the taxing power of the state. As observed in *Norton,* 340 U.S. 534, 536:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. . . .
>
> "This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce as set out in the *Dilworth* case. From a competitive point of

> view, that system has disadvantages. The trade may view the seller as remote and inaccessible. . . . Petitioner elected to localize itself in the Illiniois market with the advantages of a retail outlet in the state, to keep close to the trade, to supply locally many items and take orders for others and to reduce freight costs to local consumers. Although the concern does not, by engaging in business within the state, lose its right to do interstate business with tax immunity, *Cooney v. Mountain States Telegraph Co.,* 294 U.S. 384, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business."

Examples of other decisions of this court in accord with *Norton* include *Miller Bros. v. Maryland,* 347 U.S. 340, where the court struck down the imposition of a sales tax on the basis that the taxpayer had not exploited or invaded the consumer market in Maryland; *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, where the court stated that the commerce clause does not forbid taxation of a local business which is separate and distinct from interstate commerce; and *Freeman v. Hewit,* 329 U.S. 249.

In the case at bar it is clear that in no sense of the term has appellant elected to localize itself in the Washington market, thereby gaining the advantages of a local business. Rather, like the solicitor cases referred to in *Norton,* the appellant as seller is seen as remote and inaccessible. The Boeing Company and other Washington customers in dealing with appellant dealt directly with appellant's offices located in distant parts of the country, in different time zones, with communication and freight problems which would not exist if appellant were a local business. Based on *Norton,* it cannot be said that appellant by virtue of the activity of its engineer had elected to localize itself any

more than the Norton Co. had on their direct sales held to be exempt. The State of Washington, therefore, cannot tax appellant on the same basis as a local business.

It might be argued that in spite of the above, nevertheless appellant has received some benefits and services from the state for which the state can exact a fair return. Appellant however has received no more benefits from the state than have taxpayers in those cases where the imposition of a tax was declared unconstitutional.[5]

If imposition of the tax on appellant is upheld, it will be to the detriment of the national market. Appellant has chosen to deal with Washington customers not as a local business, but as a concern with all the inherent competitive disadvantages of interstate business. The Washington tax because it is unapportioned nevertheless taxes appellant as if appellant were a local concern. If such a tax is upheld, because of the basic unfairness of being taxed as a local business while not operating as such, appellant and other interstate concerns will be encouraged to either become more local in nature and to establish true local outlets, which is exactly the sort of forced provincialism the commerce clause was designed to protect against, or interstate concerns will sever their already thin contacts with the state, which would place interstate commerce at an unnecessarily further competitive disadvantage. In either case, domestic intrastate business would be further encouraged to deal with other "domestic" businesses to the detriment of the national market.

As stated previously, it is clear from the record that all of the essential and material incidents in connection with

5. See *supra*, page 24.

the Boeing sales occurred outside of the State of Washington. In such a case not only is there substantial risk of multiple tax burdens, it would appear that Pennsylvania and California may be the only states who can in any way tax appellant's sales of Boeing, and therefore the sales to Boeing are exempt from the Washington business and occupation tax. *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434. The Washington Court of Appeals dismissed this contention on the basis that appellant has not affirmatively shown that its activities are being taxed elsewhere on the basis of the majority opinion in *General Motors Corp. v. Washington,* 377 U.S. 436. Appellant submits however that the sounder analysis of multiple burdens is that advanced by Justice Goldberg in his dissent in *General Motors,* where with respect to the view that the application of the commerce clause depends upon the existence of actual multiple taxation, the following quote from *Freeman v. Hewit,* 329 U.S. 249, at 256 was presented:

> It is suggested . . . that the validity of a gross sales tax should depend upon whether another State has also sought to impose is burden on the transaction. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State is taxed is irrelevant to the kind of freedom of trade which the commerce clause generated. The immunities implicit in the commerce clause and the potential taxing power of a state can hardly be made to depend in the world of practical affairs, on the shifting incidents of the various tax laws of the various states at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burdens generally created by a direct tax on commerce."

The requirement that the taxpayer show actual as opposed to an exposure to the risk of multiple burdens puts a very heavy and almost impossible burden on a taxpayer. In requiring actual multiple burdens, the result is that the first state to tax preempts other states from levying a similar tax if that tax would create a multiple burden, even though it would have been fairer in the first instance for the second state to have imposed the tax. In requiring actual multiple burdens to be affirmatively shown, a situation can arise where a tax valid in one state is invalid in another, even though the same activity occurs within each state.

The state may contend that there can be no risk of multiple burdens in the present case since only the activities within the State of Washington are those being taxed with gross receipts to Washington customers being the measure. It is submitted however that since the essential wholesaling activities resulting in sales to Boeing take place in either Pennsylvania or California, those states could also impose a tax on the activities occurring in those states for the privilege of conducting wholesaling activities with the measure of the tax being the same gross receipts of sales to Washington customers. The reality of this risk is especially apparent where we have an unapportioned tax. If California and/or Pennsylvania were to impose such a tax, appellant would certainly be subject to actual multiple taxation, not borne by local commerce, and as a result would be at a competitive disadvantage with local commerce.

CONCLUSION

Appellee department of Revenue has assessed against appellant Standard Pressed Steel a "business and occupation tax" measured by unapportioned gross receipts of all sales by appellant to Washington customers, purportedly "for the act or privilege of", RCW 82.04.220, "engaging within this state in the business of making sales at wholesale", RCW 82.04.270. The taxed receipts were from the manufacture and sale of goods wholly without this state, with the in-state activity being merely that of one engineer who was not involved in any way in sales promotion or in the sales transaction.

The assessments are invalid because of lack of substantial income producing activity in the state, which is necessary to form some definite link, some minimum connection with the taxing power of the state. *Miller Bros. Co. v. Maryland,* 347 U.S. 340. Rather, appellant's in-state activity in relation to the incidence of the tax is of a de minimus nature, constituting mere entry into the state, and taxation of such activity is both unreasonable and unjust. *Norton Co. v. Department of Revenue,* 340 U.S. 534; *General Motors Corp. v. Washington,* 377 U.S. 436. If the Norton Co., with its extensive local sales office cannot be taxed on its direct order sales with in-state activity connected with such sales conducted by its corps of engineers, clearly in the case at bar, where there is no local sales activity of any kind, the assessments by appellee violate due process.

The assessments are invalid as a tax on activities which appear to be outside the borders of the state. As shown by the record, all of the necessary and material incidents to

the Washington sales were conducted in either Pennsylvania or California. To uphold the tax assessment on appellant is to impose a tax on activity over which the state has no jurisdiction. This is a violation of due process. *McLeod v. Dilworth*, 322 U.S. 327.

The tax is invalid as it does not bear a reasonable fiscal relationship to the insignificant benefits conferred by the state. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435. In other words, the tax involved violates due process as it is not properly apportioned to the activities conducted in the taxing jurisdiction. *Hans Rees Sons, Inc. v. North Carolina*, 283 U.S. 123.

The tax is invalid as a tax on the privilege of conducting business solely in interstate commerce. *Norton Co. v. Department of Revenue*, 340 U.S. 534. Appellant in no sense of the term has elected to operate and compete as a local business with the competitive advantages inherent thereto. Rather, appellant by operating in interstate commerce is viewed by customers as remote and inaccessible, and appellant is therefore operating at a competitive disadvantage with intrastate business. The assessments are therefore repugnant to the commerce clause. *Norton Co. v. Department of Revenue*, 340 U.S. 534; *Miller Bros. Co. v. Maryland*, 347 U.S. 340. Certainly, to impose a tax on appellant the same as if all of its activity in relation to Washington sales occurred locally, is unreasonable, unjust, and repugnant to both the commerce clause and the due process clause.

The tax assessments are invalid because they expose appellant to the risk of repeated and multiple tax burdens. *Freeman v. Hewit*, 329 U.S. 249. Under the facts in the case at bar, where all of the material incidents in connection

with the sales occur outside of the state, it would appear that Pennsylvania and California are the only states which in any way can tax appellant's sales to Boeing. If the court were to defer on the basis that there is no showing of actual multiple taxation, the immunities implicit in the commerce clause would be made to depend on the vagaries and shifting incidents of the various state legislatures.

The opinion below rests on the erroneous rule of law that any activity within the state, regardless of the amount and effect of such activities, is a sufficient local incident to justify the assessments, and since the tax on the gross receipts is only a measure of the tax on such in-state activities, there can be no interference with interstate commerce. The result of the decision below, if left to stand, is that a taxpayer who has not elected to compete on a local basis and who does not have the advantages of local business, nevertheless has lost its immunity from taxation, and the state will be exacting tax without providing sufficient benefits in return. This would introduce serious uncertainty in interstate business. Firms once considered exempt would be considered fair game and would be in jeopardy. Such a weakening of the constitutional protections would result in interstate business receiving only negligible protection if at all. If the decision below is left to stand, *Norton Co. v. Department of Revenue*, 340 U.S. 534, will of necessity, be overruled. Activities previously held by this court to be insufficient to justify a business and occupation privilege tax will now be sufficient. This decision below will extend the taxing power of a state to the detriment of the national market. In every prior instance where the taxing power of a state, including Washington, has been upheld on appeal, far more significant in-state activity in connection with its

transactions has been present than exists here, especially where the tax was a privilege tax measured by unapportioned gross receipts. There is no precedent for upholding the decision below where the activities of appellant within the state are so thin and insubstantial.

The judgment of the Washington Court of Appeals should be reversed and remanded with directions to refund to appellant the sum of $33,444.91.

Respectfully submitted,

KENNETH L. CORNELL
and HAROLD S. FARDAL
KELLER, ROHRBACK, WALDO,
MOREN & HISCOCK
Attorneys for Appellant

APPENDIX A

STATUTES

Chapter 82.04 of the Revised Code of Washington

82.04.040 *"Sale," "casual or isolated sale."* "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.04.050. It includes renting or leasing, conditional sale contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It also includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

"Casual or isolated sale" means a sale made by a person who is not engaged in the business of selling the type of property involved. (Revised Code of Washington, Vol. 8, p. 3.)

82.04.060 *"Sale at wholesale," "wholesale sale."* "Sale at wholesale" or "wholesale sale" means any sale of tangible personal property which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a rental sale by RCW 82.04.050 when rendered to or for consumers: *Provided*, That the term "real or personal property" as used in this section shall not include any natural products named in RCW 82.04.100. (Revised Code of Washington, Vol. 8, pp. 5, 6.)

82.04.070 *"Gross proceeds of sales."* "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses. (Revised Code of Washington, Vol. 8, p. 6.)

82.04.220 *Business and occupation tax imposed.* There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds or sales, or gross income of the business, as the case may be. (Revised Code of Washington, Vol. 8, p. 9.)

82.04.270 *Tax on wholesalers, distributors.* (1) Upon every person except persons taxable under subsection (1) of RCW 82.04.260 engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one percent.

(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided,* That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying one-quarter of one percent the value of the article so distributed as of the time of such distribution: *Provided,* That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The tax commission shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: *Provided further,* That delivery trucks or vans will not under the purposes of this

section be considered to be retail stores or outlets. (Revised Code of Washington, Vol. 8, p.11.)

82.04.500 *Tax part of operating overhead.* It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons. (Revised Code of Washington, Vol. 8, p. 19.)

APPENDIX B

UNITED STATES CONSTITUTION

Art. I, Sec. 8, clause 3:

"The Congress shall have Power—

* * *

"To regulate Commerce * * * among the several States* * *"

Fourteenth Amendment, Sec. 1:

"* * * nor shall any State deprive any person of * * * property, without due process of law;* * *"

Supreme Court, U. S.
FILED
SEP 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973
No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant

v.

DEPARTMENT OF REVENUE,
Appellee

ON APPEAL FROM THE WASHINGTON
STATE COURT OF APPEALS, DIVISION II

BRIEF OF APPELLEES

SLADE GORTON,
Attorney General,

TIMOTHY R. MALONE,
Sr. Assistant Attorney General,

WILLIAM D. DEXTER,
Assistant Attorney General,

Attorneys for Appellee.

Office and Post Office Address: 615 General Administration Bldg.,
Olympia, Washington 98504 Telephone: (206) 753-5515.

STATE PRINTING PLANT OLYMPIA, WASHINGTON

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant

v.

DEPARTMENT OF REVENUE,
Appellee

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

SLADE GORTON,
Attorney General,

TIMOTHY R. MALONE,
Sr. Assistant Attorney General,

WILLIAM D. DEXTER,
Assistant Attorney General,

Attorneys for Appellee.

Office and Post Office Address: 415 General Administration Bldg., Olympia, Washington 98504. Telephone: (206) 753-5515.

INDEX

Page

QUESTION PRESENTED 5
STATEMENT OF THE CASE 6
SUMMARY OF ARGUMENT 13
ARGUMENT 19
A. Introductory Considerations 19
B. The In-State Activities of Standard Pressed Steel Are Sufficient to Establish a Constitutional Due Process Nexus 21
C. Standard Has the Burden to Establish (i) Its Claimed Tax Immunity; (ii) That the Findings of Fact of the Court Below Are Not Supported by Substantial Evidence; (iii) That Its In-State Activities Are Disassociated from its Wholesaling Sales to Boeing in Washington 25
D. Under the Controlling Principles Set Forth in *General Motors, supra,* and *Norton, supra,* the Tax in Question Has Been Validly Imposed on Standard's In-State Activities of Wholesaling Measured by its Wholesale Sales to Boeing and is Not Invalid Under the Commerce and Due Process Clauses of the Federal Constitution 28
1. *General Motors, supra,* and *Norton, supra,* uphold the power of the destination state to impose a local privilege tax on a seller measured by gross receipts from interstate sales if the activities of the seller in the destination state constitute local taxable incidents and the destination state, as a result of these localized activities, bears a special relation to the interstate sales, and the localized activities are decisive factors which permit the seller to establish and maintain a market in the destination state for the sales 28
2. Contrary to Standard's argument, the activities of the Norton engineers in *Norton, supra,* are not comparable to those of Martinson in the instant case and were not shown to be related to Norton's direct interstate sales; therefore, *Norton, supra,* does not support Standard's claim of tax immunity for the wholesale sales in question 38
3. Contrary to Standard's argument, it did engage in a local business in Washington of making wholesale sales; its Washington activities pertaining to this business were not *de minimis*; and all the necessary incidents of this business did not take place outside of Washington 42

INDEX—Continued

Page

4. The Washington wholesaling business and occupation tax does not subject Standard to the risk of multiple tax burdens on its wholesale sales of products delivered in Washington to Boeing and this Court will not pass on this question as an abstract proposition 45

CONCLUSION 51

TABLE OF CASES

Adams Manufacturing Co. v. Storen, 304 U.S. 307 (1938) 18, 29, 47, 48

American Oil Co. v. Neill, 380 U.S. 451 (1965) 26, 41

Cheney Bros. Co. v. Massachusetts, 246 U.S. 147 (1918) ... 22

Crown Zellerbach v. State, 45 Wn.2d 749 278 P.2d 305 (1954) 50

Evco v. Jones, 409 U.S. 91 (1972) 18, 29, 48, 53

Fibreboard Paper Products Corp. v. State, 66 Wn.2d 87, 401 P.2d 623 (1965) 31

Field Enterprises, Inc. v. State of Washington, 47 Wn.2d 852, 289 P.2d 1010, aff'd per curiam, 352 U.S. 806 (1956) 15, 18, 23, 25, 48

Freeman v. Hewit, 329 U.S. 249 (1946) 18, 29, 47, 51, 53

General Motors Corp. v. Washington, 377 U.S. 436 (1964) ...6, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, et seq.

General Motors Corp. v. Washington, 60 Wn.2d 862, 376 P.2d 843 (1962) 34, 37

Gwin, White and Prince, Inc. v. Henneford, 305 U.S. 434 (1939) 18, 29, 47, 48

International Harvester v. Kentucky, 234 U.S. 586 (1914). 21

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 15, 21

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1939) 18, 48, 53

Miller Brothers Co. v. Maryland, 347 U.S. 340 (1954) 16, 22, 32, 33, 41

Milliken v. Meyer, 311 U.S. 457 (1940) 22, 32

National Bellas Hess, Inc. v. Dept. of Revenue, 386 U.S. 753 (1967) 20

Norfolk & Western Ry. Co. v. Missouri State Tax Comm., 390 U.S. 317 (1969) 20

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 15, 22, 25 46

Norton Co. v. Department of Revenue, 340 U.S. 534 (1951) ..... 12. 13, 14, 18, 25, 26, 27, 28, et. seq.

Norton Co. v. Department of Revenue, 405 Ill. 314, 90 N.E.2d 737 (1950) 14, 40

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant

v.

DEPARTMENT OF REVENUE,
Appellee

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

QUESTION PRESENTED

Does a state tax imposed on the privilege of engaging in the business of making sales at wholesale within the taxing state measured by gross receipts from sales of products delivered in the taxing state from out-state sources, violate the Commerce and Due Process Clauses where the taxpayer is a foreign corporation which conducts substantial sales activities in the taxing state (1) by visiting out-of-state employees and (2) by maintaining in the taxing state a resident sales employee (a) who operates out of an office in his home, (b) who maintains virtual daily contact with the taxpayer's only significant customer

in the state, and (c) whose activities are related solely to and are decisive factors in establishing and maintaining the market for the sales by which the tax is measured?

STATEMENT OF THE CASE

A. **Nature of the Case.** This is an appeal by Appellant, Standard Pressed Steel Co. (hereinafter referred to as Standard) from a final judgment of the Washington Court of Appeals, sustaining the assessment of Washington's business and occupation tax on persons "engaging within the state in the business of making sales at wholesale." RCW 82.04.270.[1] The tax was measured by the unapportioned gross receipts of Standard resulting from sales of industrial and aerospace fastener systems manufactured by Standard in Pennsylvania and California and sold to customers located in Washington, principally The Boeing Company (hereinafter referred to as Boeing), during the period January 1, 1965, through June 30, 1969 (A. 3).

B. **Business of Standard.** Standard is a Delaware corporation with manufacturing facilities located in Jenkintown, Pennsylvania and Santa Ana, California (A. 14, 77). Among other things, it manufactures highly specialized industrial and aerospace

[1] This is the same tax that was before this court in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). See also RCW 82.04.220, the general imposition section, which l ..es the tax on persons "for the act or privilege of engaging in busi..ess activities." Other sections, such as RCW 82.04.270, set the rate for each category of business activities.

fastener systems (nuts, bolts and rivets generally [A. 90, 91, Ex. B]). Its principal customer in Washington is Boeing (A. 77, 78).

C. **Activities of in-state personnel.** During the early part of the period in question, Standard maintained a sales office in Seattle (A. 4, 81). On February 11, 1966, this office was closed and thereafter the company had only one employee permanently located in the state, Mr. Robert H. Martinson (hereinafter referred to as Martinson), a Washington resident, with the job title of "Sales Engineer" (A. 76). Martinson had a college degree in animal husbandry (A. 76). In training for his job Martinson spent time at Standard's plants learning how the products were made and the general technology of the products A. 77). His supervisor was the "sales manager", and his typing was done by the sales manager's secretary (A. 79).

In his home Martinson had a desk, file, and telephone which he used as his office (A. 70), and for which he took a federal income tax deduction. The telephone was listed under Martinson's home address, but was used by Martinson in the conduct of his business (A. 80). Standard also maintained an answering service in the Seattle area which received calls for Martinson (Ex. K, A. 79, 80). Martinson confined his activities exclusively to representing Standard in its relation with Boeing, his superiors being of the view that other Washington customers did not

generate enough business to make it worth his time A. 77-78).

On the job Martinson worked directly with Boeing design engineers, standards engineers, and project engineers (qualifications engineers) (A. 76-77). The majority of his duties fell into two general categories: (1) the qualification process and (2) the problem solving process (A. 76). The record is silent concerning any other duties except "public relations" and obtaining sales information.

1. **Martinson's qualification activities.** In order to sell its products to Boeing, a supplier must first qualify as an "approved source". In the words of Martinson:

> "Well, anything you manufacture for Boeing, you have to have qualified at the Boeing source. Boeing determines who will be a supplier of theirs by qualifications done here in the Seattle area." (A. 85)[2]

Martinson spent approximately 80-90 percent of his time on this qualification process (A. 94). In working with Boeing's engineers Martinson would become informed that Boeing was considering a certain fastener system (A. 76, 89). He would issue a products engineering request describing in necessary detail Boeing's specifications and would send the information to Standard's chief engineer in Santa Ana, California (Ex. J, A. 89). If Standard wished to "qualify" for Boeing's list of approved sources,

[2]The wisdom of this Boeing policy is apparent, especially with regard to such critical products as the nuts, bolts, and rivets which hold Boeing's aircraft together.

i.e., become a supplier, samples were made and shipped directly to Boeing for qualification tests (Ex. D, A. 85). Martinson would work with Boeing's engineers on qualification problems to make certain Standard was a qualified source; and he would then notify his superiors if Standard had so qualified (Ex. B, A. 84-85).

2. **Martinson's problem-solving activities.** Once a product had qualified and had been purchased by Boeing, Martinson would work with Boeing's engineers with respect to any problem with the product. The problem-solving process was handled in much the same way as the qualification process. Martinson would inform himself of any problems Boeing was having with the product and report his findings to Standard's engineers, who would in turn come up with proposed solutions and forward these to Martinson for his presentation to Boeing's engineers (A. 82-83).

3. **Miscellaneous activities of Martinson.** Martinson informed his superiors of the job responsibilities and phone numbers of Boeing's purchasing specialists and control buyers of each commodity for which Standard had qualified as an "approved source" and organizational information pertaining to Boeing (Ex. E, F, G, H, I, A. 87-89).[3] Martinson would also set up meetings with Boeing engineers and visiting

[3]Martinson explained the purpose of furnishing this information as follows:

> Boeing goes through so many reorganizations, and changes locations so many times, and personnel, you deal with specifics. These pieces of correspondence try to tell our people which people are now handling certain products." (A. 87)

groups of Standard's engineers. These visiting engineers were application, coding and general engineers who visited Boeing about three days every six weeks to discuss problems relating to the use of Standard's products in aircraft Boeing was building (A. 80-81).

In addition to his specific product oriented activities Martinson performed public relation services, such as the arrangement for a hospitality room for a meeting of the Society of Aerospace and Process Engineers, which included Boeing engineers (Ex. C, A. 85-86). All expenses were sent directly to the home office (A. 94).

D. **Activities of visiting personnel.** Application, coding and general engineers visited Boeing approximately three days every six weeks (A. 80, 81). A majority of their time in Washington was spent on working on engineering problems (A. 80). The nature of their visits was "to discuss problems in bolts or bolting material or codings in conjunction with the airplane that Boeing was building" (A. 81). The record does not disclose whether or not the visiting engineers performed any other services.

E. **Mechanics of order, acceptance, and delivery.** After Standard had successfully qualified its fasteners, it would become an "approved source" and Boeing would then enter into negotiations for purchase of the fasteners (A. 88-89, 93-94). All such dealings and negotiations were carried on between Boeing and Standard's out-of-state offices (A. 88-89, 93-94). Martinson neither placed nor accepted orders; Boeing placed its orders directly (A. 94). Standard, through its out-of-state offices, negotiated price and delivery date, accepted orders, handled shipments and invoicing, and collected payments (A. 14-15, 93). No inventories were kept in this state (A. 93). Deliveries were made by Standard directly through a common carrier (A. 93).

Martinson was not directly involved in the actual mechanics of order, acceptance, and delivery (A. 17, 94). However, Martinson did supply the sales manager and other personnel of Standard with lists of competitors (Ex. B), and a list of competitive prices at Boeing with an evaluation of factors involved in Boeing's purchasing decisions (Ex. L).

F. **Proceedings below.** Subsequent to the Department of Revenue's determination that the business activities of Standard in Washington were sufficient to support the assessment of the B&O tax here in question (A. 3-12), full independent review was conducted by three appellate tribunals—the Washington State Board of Tax Appeals (A. 13-22); Thurston County Superior Court (A. 26-31); and the Washington Court of Appeals, an intermediate appellate court (A. 33-42). A petition for further review of the Department's determination was denied by the Washington Supreme Court (A. 71).

Judicial review was conducted by the lower courts on a *de novo* basis (A. 26, 34), with each reviewing court looking at the facts of the case as revealed by the entire record. In each instance the

reviewing courts found *as a matter of fact* that Martinson's activities carried on in Washington on behalf of Standard were necessary in order that Standard could:

> "(1) become aware of which of its products the Boeing Company might be able to use; (2) secure the testing of sample products to qualify the products for sale to the Boeing Company; (3) obtain the engineering designs for such products; (4) resolve problems in the use of the products after receipt and use by the Boeing Company; (5) obtain and retain goodwill and working rapport with Boeing personnel; and (6) secure and update lists of Boeing purchasing specialists or control buyers, and the commodities for which they are responsible for the use of the personnel at the plaintiff's home office." (A. 27, 37)

The Court of Appeals found that the above activities were "substantial services" constituting a "peculiarly local activity" so as to support the imposition of the B&O tax on the privilege of engaging in a local business (A. 38). The Court of Appeals further found that these local activities

> "* * * were instrumental in establishing and maintaining The Boeing Company as a market for the sales giving rise to the proceeds by which the state seeks to measure the tax." (A. 40)

Accordingly, the court reasoned on authority of *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), and *General Motors Corp. v. Washington*, 377 U.S. 436 (1964) that the gross proceeds of sales to Boeing were reasonably related to Standard's wholesaling in-state activities constituting the incidents of the tax and therefore the Commerce and Due Process Clauses were not offended by the imposition of the tax, measured by such sales.

SUMMARY OF ARGUMENT

This appeal involves a determination by this Court of the significance and the effect of Standard's wholesaling activities in Washington, in reference to the limitations placed on Washington's power to tax such activities by the Commerce and Due Process Clauses of the federal constitution. The tax in question is the same tax involved in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). The basic question at issue is whether or not this cause is factually distinguishable for constitutional law purposes from *General Motors*. It is Washington's position that the tax in question is valid under the controlling principles set forth in that decision.

Standard's sole defense to liability for the tax in question is that the otherwise supportable factual and legal conclusions of the Court below are erroneous because its activities in Washington were de minimis and no different from the activities of the engineers in *Norton v. Department of Revenue*, 340 U.S. 534 (1951). This reed-like argument of Standard is based upon at least three fundamental errors, namely: (1) an incomplete statement and a misconstruction of the significance and operative effect of the facts pertaining to its wholesaling activities in Washington; (2) a misstatement of the facts in

Norton pertaining to Norton engineers and unsupportable inferences concerning the nature and extent of Norton's engineers' activities in Illinois concerning the exempt Norton sales; and (3) an erroneous interpretation and application of rules of law established in the *Norton* and *General Motors* decisions.

A comparison of facts in this case with the facts in *Norton* pertaining to the exempt Norton sales demonstrates that Standard erroneously relies on *Norton*. There is not one scintilla of evidence in the record in *Norton* nor any statement by either the Illinois Supreme Court in *Norton Co. v. Department of Revenue*, 405 Ill. 314, 90 N.E.2d 737 (1950) or this Court in *Norton* which establish that the Norton engineers had anything in fact to do with the exempt sales. Furthermore, in the instant case, Martinson was not an engineer giving technical engineering advice. He was a "salesman" responsible to the sales manager, and was engaged in activities to directly promote sales to Boeing in Washington. Standard's technical engineering services to Boeing were performed by visiting engineers.

In distinguishing *Norton* as to exempt sales, the Court below made significant factual findings and conclusions. Without challenging these findings of fact and conclusions concerning the significance and operating effect of its in-state activities, Standard simply argues on authority of *Norton* that as a matter of law the lower Court could not have found that the tax was imposed on the act or the privilege of

doing a local business and could not have properly determined that its in-state activities in Washington were instrumental in establishing and maintaining Boeing as a market for the sales in question. Inasmuch as this argument is not supported by a comparison of the facts in this cause with the facts pertaining to the exempt sales in *Norton*, this Court's decision in *Norton* is not precedent for Standard's claimed exemption.

In asserting that *General Motors, supra*, is controlling precedent here, the State recognizes that a local privilege tax measured by gross receipts is "suspect" under both the Due Process and Commerce Clauses. Nevertheless, when a tax such as the tax in question is imposed in conformity with the constitutional standards set forth in *General Motors*, it should be upheld.

These requirements have been met in the case at bar. First, the in-state activities of Standard are sufficient to establish its "presence" for purposes of the exercise of state jurisdiction. Standard, just as General Motors, carried on sales activities in Washington by means of resident employees operating out of offices in their homes. As an initial matter, this constitutes sufficient presence to support the exercise of state jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Field Enterprises, Inc. v. Washington*, 47 Wn. 852, 289 P.2d 1010, aff'd *per curiam* 352 U.S. 806 (1956); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

Second, once a taxpayer is jurisdictionally present in the state, due process requires that the activities manifesting this presence constitute "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344, 345 (1954) (quoted with approval in *General Motors, supra*, 377 U.S. at 448.). In applying the "minimum connection" test to the tax in question, *General Motors* teaches that: (1) "we look to the taxpayer's business activities within the state, i.e., local incidents, to determine if the gross receipts from the sales therein may be fairly related to those activities," 377 U.S. at 441; (2) the in-state activities must constitute "substantial services * * * with relation to the establishment and maintenance of sales, upon which the tax was measured," 377 U.S. at 447; and (3) the activities bear a substantial relation to the establishment and maintenance of sales, upon which the tax is measured, if they are "decisive factors in establishing and holding this market," 377 U.S. at 448. These due process requirements are qualitative and not quantitative. It is the purpose and effect of these in-state activities which control. The courts below found, and there is ample support in the record for such a finding, that Standard's activities in Washington meet these requirements. While differing as to detail and quantity, Martinson's in-state activities and that of visiting personnel are not qualitatively distinguishable from the activities of General Motors personnel in regard

to the wholesale sales at issue in *General Motors, supra.*

Third, the Commerce Clause requires that the tax in question (imposed on the act or privilege of conducting a wholesailng business in Washington) be imposed on a local business and not on the privilege of engaging in interstate commerce. In resolving this question in *General Motors, supra*, this Court held that the tax in question was not on the privilege of engaging in interstate commerce, but rather was on "local incidents as the State can reach", 377 U.S. at 447, and constituted a "fair demand for that aspect of interstate commerce to which it [the taxing state] bears a special relation." 377 U.S. at 440. The mere fact that the mechanics of the sales were conducted in interstate commerce did not convert the local activities of General Motors' sales personnel into activities in interstate commerce. As in *General Motors, supra*, the *decisive activities* which enabled Standard to utilize Boeing in Washington as a market were localized in Washington and were intrastate in nature. It is these activities which constitute the local business and establish the "special relation" of Washington to the wholesale sales in question, permitting the state to measure the tax by gross receipts derived from such wholesale sales. *General Motors, supra.*

Fourth, the Commerce Clause requires that a state tax cannot discriminate against, or impose multiple burdens upon, interstate commerce. In this case,

no argument has been made that the tax in question discriminates against interstate commerce. The tax applies equally to all wholesale businesses in the State of Washington. Furthermore, Standard has not met the burden imposed upon it by *General Motors, supra*, to establish that the tax in question is unconstitutional because its wholesale sales in Washington are subject to a multiple tax burden. In resolving the multiple tax burden question this Court has refused to deal in abstractions (*General Motors, supra*). Where local nexus exits, it has upheld the destination state's power to tax receipts from interstate sales, [*General Motors, supra; Field Enterprises, Inc. v. State*, 352 U.S. 806 (1956); *Norton Company v. Department of Revenue*, 340 U.S. 534 (1951); *McGoldrick v. Berwind White Coal Mining Co.*, 309 U.S. 33 (1939)] and denied the state of origin the power to tax receipts from interstate sales. [*Gwin, White and Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *Freeman v. Hewit*, 329 U.S. 249 (1946); *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Evco v. Jones*, 409 U.S. 91 (1972)]

Finally, consistent with the foregoing Due Process and Commerce Clause limitations, this Court has required interstate commerce to pay its own way. *General Motors, supra*, 377 U.S. at 439 (and cases cited therein). Barring any problems of insufficient nexus, discrimination, or multiple burdens, "[e]ven interstate business must pay its way." *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252 (1919), (quoted with approval in *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 254 (1940), and *General Motors, supra*, 377 U.S. at 439). To strike down the tax in question would be in violation of this principle and would require Washington to subsidize Standard's Washington business.

In the last analysis, Due Process and Commerce Clause requirements are met if the state tax constitutes a fair demand for the benefits, privileges, and opportunities afforded the taxpayer by the taxing state. *Wisconsin v. J. C. Penney*, 311 U.S. 435 (1940).

ARGUMENT

A. Introductory Considerations

Standard here, as did General Motors in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), challenges the tax in question under both the Commerce and Due Process clauses of the federal constitution. Claimed constitutional immunity from state taxation in each instance poses factual questions to be resolved pertaining to the nature and extent of in-state business activities as related to the subject of taxation and its measurement. The initial inquiry is whether or not Standard was "present" in the state of Washington for due process of law purposes during the period in question. Once this is established, the further question under the Due Process Clause is whether "the taxing power exerted by

the state bears fiscal relation to the protection, opportunity and benefits given by the state. The simple but controlling question is whether the "state has given anything for which it can ask return." *Wisconsin v. J. C. Penney*, 311 U.S. 435, 444 (1940) The question under the Commerce Clause is what portion of an interstate business may appropriately be attributed to the taxing state as a result of the local business activity in the state. *General Motors Corp. v. Washington, supra.*

Once it is determined that a taxpayer is present in the state in a constitutional due process sense, the principles and concepts embodied in otherwise applicable due process limitations and interstate commerce limitations are closely related and overlap to a considerable degree. *Ott v. Mississippi Valley Barge Line*, 336 U.S. 169 (1949); *National Bellas Hess Inc. v. Department of Revenue*, 386 U.S. 753 (1967); *Norfolk and Western Ry. Co. v. Missouri State Tax Comm.*, 390 U.S. 317 (1969). These requirements are generally met if the state has exerted its taxing power on and in proportion to the taxpayer's in-state activities and the "consequent enjoyment of the opportunities and protections which the state has afforded." *General Motors, supra*, 377 U.S. 436 at 441.

In order to avoid duplication of the arguments pertaining to substantive due process (the "association" test) and interstate commerce the substantive due process argument and the interstate commerce

argument (except for the multiple burden question) will be considered together. It is self-evident that if the Washington tax in question is imposed on local activities (incidents) and is measured by receipts reasonably attributable to these local activities both due process and interstate commerce requirements are met.

B. The In-state Activities of Standard Pressed Steel are Sufficient to Establish a Constitutional Due Process Nexus.

The threshold constitutional question is whether Standard, by reason of its local activities carried on by Mr. Martinson and visiting personnel, has had sufficient contact with the state of Washington to confer, as a matter of due process, jurisdiction to impose a tax measured by gross receipts from sales derived from these local activities.

Historically under the Due Process Clause the touchstone of a state's jurisdiction over a person or property has been grounded on physical presence within the territorial jurisdiction of the state. *Pennoyer v. Neff*, 95 U.S. 714 (1878).[1] Over the years the requirement of actual physical presence has given way to the requirement that if a person be not present within the territory of the state, he have cer-

[1] In case of a corporation which, unlike an individual, may be "present" in more than one state, its presence in a particular state can be manifested only by activities carried on in its behalf by its agents or employees. Thus, in order to determine whether a foreign corporation is "present" within a state, the courts have traditionally looked to the nature and extent of the activities of the corporation carried on by its agents and employees within the state. *International Harvester v. Kentucky*, 234 U.S. 586 (1914); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Scripto v. Carson*, 362 U.S. 207 (1961).

tain minimum contacts with it so that the exertion of jurisdiction does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

In the area of state taxation of an interstate business, these "traditional notions of fair play and substantial justice" have been embodied in the oft repeated question of "whether the state has given anything for which it can ask return." *Wisconsin v. J. C. Penney, supra*, 311 U.S. 435, 444. Stated otherwise, does a foreign corporation have sufficient contact with the state in order that "the taxing power exerted by the state bear[s] fiscal relation to the protection, opportunities and benefits given by the state." (*Ibid.*, 311 U.S. at 444) In the last analysis, "due process requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax." *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344, 345 (1954).

In applying the due process test, this Court has held that the local warehousing of goods and maintenance of a local repair station to repair the taxpayer's products were sufficient for imposition of a privilege tax measured by capital stock. *Cheney Bros. Co. v. Massachusetts*, 246 U.S. 147 (1918). This Court futher has held that maintenance of resident salesmen and local sales offices in the taxing state constituted sufficient due process presence for imposition of a net income tax [*Northwestern States*

Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)] and the Washington business and occupation tax measured by gross receipts [*Field Enterprises, Inc. v. State of Washington*, 47 Wn.2d 852, 289 P.2d 1010, aff'd. per curiam, 352 U.S. 806 (1956) and *General Motors v. Washington, supra.*] Continuous and systematic local solicitation of sales by the taxpayer's resident agents was held sufficient connection for use tax collection purposes. *Scripto v. Carson*, 362 U.S. 207 (1960).

These cases stand for the proposition that a state can exert its taxing jurisdiction over a foreign corporation if the foreign corporation has manifested its presence in the taxing state by means of maintaining resident employees or property therein, devoted to the business purposes for which entry was made. Implicit in the above cited cases is the understanding that by reason of maintaining resident employees or property in the taxing state the foreign corporation has generally availed itself of the "protection, opportunities and benefits given by the state." *Wisconsin v. J. C. Penney, supra.*

An examination of the nature and extent of Standard's activities in the state of Washington leaves no doubt that its activities in Washington were sufficient to support, as an initial matter, the exercise of tax jurisdiction. During the early part of the tax period in question, Standard maintained a sales office in Seattle. Subsequently, it maintained a resident employee who operated out of a sales

office in his home. This is a distinction without a difference.[8]

In addition, the company maintained a telephone listing and answering service in the state to facilitate local contact with its employee and its customers. Out-of-state employees were sent into the state on a regular and systematic basis to consult with Boeing and the resident salesman in regard to the use of its products. And finally, Standard's resident employee maintained continuous and systematic contact on virtually a daily basis with Boeing (Standard's only significant customer in the state) in furtherance of the business purposes of Standard.

The Washington B&O tax at bar is a tax on the business of making wholesale *sales* in Washington, *i.e.*, a tax on the act or privilege of exploiting the Washington market as a wholesale seller. Here, Washington has provided a market for Standard's products. Through its system of laws, bolstered by access to its courts, the state has provided, at considerable expense, certainty and order to the conduct of the market, without which it would be impossible to engage in any business transactions above the level of a "barter economy". The state, through its tax on the act or privilege of engaging in the business of making sales, is merely asking Standard to bear part of the cost of providing the services necessary to

[8] As was said in *General Motors Corp. v. Washington*, 377 U.S. 436, 447:

"We place little weight on the fact that these divisions had no formal offices in the State, since in actuality the homes of these officials were used as corporate offices. Despite their label as 'homes' they served the corporation just as effectively as 'offices.'"

maintain certainty and order in the market, in order that it and other sellers may exploit the market and obtain the maximum benefits and opportunities from their transactions. *Wisconsin v. J. C. Penney, supra.*

Clearly, under the principles set forth in *Northwestern States Portland Cement v. Minnesota*, 358 U.S. 450 (1959), *Field Enterprises, Inc. v. Washington*, 352 U.S. 806 (1956), *Scripto v. Carson*, 362 U.S. 207 (1960), and *General Motors Corp. v. Washington, supra*, the activities of Standard carried on in Washington were of sufficient magnitude to manifest corporate presence in Washington sufficient to support the exercise of its taxing jurisdiction consistent with the minimal requirements of due process.

C. **Standard Has the Burden to Establish (i) Its Claimed Tax Immunity; (ii) That the Findings of Fact of the Court Below are not Supported by Substantial Evidence (iii) That its In-state Activities are Disassociated from its Wholesaling Sales to Boeing in Washington.**

As stated in *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951):

> "The general rule, applicable here, its that a taxpayer claiming immunity from a tax has the burden of establishing his exemption.
> "This burden is never met by showing a fair difference of opinion which as an original matter might be decided differently. * * *"
> (340 U.S. at 537-538)

Standard in substance is challenging the findings of fact of the lower court. This Court, however,

will not overturn these findings of fact if they are "supported by substantial evidence".

In *Norton*, *supra*, 340 U.S. at 538, this Court stated:

> "Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence."

This doctrine was reaffirmed fourteen years later when the above language was quoted and followed in *General Motors Corp. v. Washington*, *supra*.

As a substantive matter, in order to meet these burdens of proof once it is established that Standard is jurisdictionally present in the state for Due Process and Commerce Clause purposes (conducting a local business), it must disassociate its in-state activity from the local taxable incidents and the receipts used to measure the tax. As stated in *American Oil Co. v. Neill*, 380 U.S. 451, 457 (1965):

> "* * * When a tax is imposed on an out-of-state vendor, 'nexus' between the taxing state and the taxpayer is the outstanding prerequisite on state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. Co. v. Maryland*, *supra*, 347 US at 344-345. Granted that when a corporation, pursuant to permission given, enters a state and proceeds to do local business the 'link' is strong. In such instances there is a strong

> inference that it exists between the state in transactions which result in economic benefits obtained from a source within the state's territorial limits. The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with the out-of-state sales. In such instances, the transactions are said to be 'disassociated from the local business,' *Norton Co. v. Dept. of Revenue*, *supra*, 340 US at 537, and therefore may not, consistent with due process be taxed."

Standard has not met these burdens of proof. It would escape taxation here by characterizing its Washington activities as *de minimis* and no different from the activities of Norton's engineers in reference to the sales held exempt in the *Norton* case, *supra*.[*]

In this manner, Standard attempts to circumvent the specific holdings of this court in *Norton*, *supra*, and *General Motors*, *supra*, (i) that it must show that the findings of fact of the court below are not supported by substantial evidence and (ii) that once it entered Washington to conduct local activities here to promote the sales of its products to Boeing, it must establish that these activities were disassociated from the incidence of the Washington tax and were not decisive factors in establishing and

[*]Standard argues, as a matter of law, that the court below could not conclude (i) that its activities in Washington constituted local incidents sufficient to uphold the tax in question and (ii) these activities were instrumental in establishing and holding the Washington market for its sales to Boeing because this court found comparable activities in *Norton*, *supra*, to be insufficient for these purposes. As indicated *infra* at pages 38-42 neither the *Norton* record nor the *Norton* decision support this argument.

holding Boeing as a market for its Washington sales to Boeing.

D. **Under the Controlling Principles Set Forth in General Motors, supra, and Norton, supra, the Tax in Question Has Been Validly Imposed on Standard's In-state Activities of Wholesaling Measured by its Wholesale Sales to Boeing and is not Invalid Under the Commerce and Due Process Clauses of the Federal Constitution.**

1. *General Motors, supra, and Norton, supra, uphold the power of the destination state to impose a local privilege tax on a seller measured by gross receipts from interstate sales if the activities of the seller in the destination state constitute local taxable incidents and the destination state, as a result of these localized activities, bears a special relation to the interstate sales, and the localized activities are decisive factors which permit the seller to establish and maintain a market in the destination state for the sales.*

As stated by this court in *General Motors, supra*:

> "We start with the proposition that '[i]t was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business' *Western Livestock v Bureau of Revenue*, 303 US 250, 254. * * * 'Even interstate business must pay its way,' *Postal Telegraph-Cable Co. v Richmond*, 249 US 252, 259 * * * as is evi-

> denced by numerous opinions of this court." (377 U.S. 436, 439)[1]

In requiring interstate businesses to pay their way in reference to a tax imposed on or measured by gross receipts, this court noted in *General Motors, supra*:

> "A careful analysis of the cases in this field teaches that *the validity of the tax rests upon whether the state is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation.* For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the state has exerted its power in proper proportion to appellant's activities within the state and to appellant's consequent enjoyment of the opportunities and protections which the state has afforded. Where, as in the instant case, the taxing state is not the domiciliary state, *we look to the taxpayer's business activities within the state, i.e., the local incidents, to determine if the gross receipts from the sales therein may be fairly related to those activities.* As was said in Wisconsin v J. C. Penney Co., 311 US 435, 444 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.' " (377 U.S. 436, 440, 441)
>
> * * * *
>
> " 'It is beyond dispute,' we said in Northwestern States Portland Cement Co. v Minnesota, supra, 358 US at 548, 'that a state may not lay a tax

[1] As indicated at pages 47-49, *infra*, cases such as *Gwin, White and Prince, Inc. v. Henneford, supra*, 305 U.S. 434 (1939), *Freeman v. Hewitt, supra*, 329 U.S. 249 (1946), *Adams Manufacturing Co. v. Storen, supra*, 304 U.S. 307 (1938) and *Evco v. Jones, supra*, 409 U.S. 91 (1972), establish that under the multiple burdens test the states of Pennsylvania and California (the origin states of the sales in question) could not impose such a gross receipts tax in Standard's wholesaling activities.

on the "privilege" of engaging in interstate commerce.' But that is not this case. To so contend here is to overlook a long line of cases of this court holding that an in-state activity may be a sufficient local incident upon which a tax may be based. As was said in Spector Motor Service, Inc. v. O'Connor, 340 US 602, 609 (1951), '[t]he state is not precluded from imposing taxes upon other activities or aspects of this [interstate] business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the state.' This is exactly what Washington seeks to do here and we cannot say that the appellant has shown that its activities within the state are not such incidents as the state can reach. Norton Co. v Dept. of Revenue, supra, 340 US at 537," (377 U.S. at 436, 446-447. Emphasis added.)

Thus, our inquiry at this point is to determine if the Washington B&O wholesaling tax in the instant case is imposed on Standard's business activities within Washington which are fairly related to its wholesale sales to Boeing to which Washington bears a special relation.

As heretofore indicated, the tax in question is the same tax before this court in the *General Motors* case. This Court there recognized that the tax was "imposed upon the privilege of engaging in business activities within the state" (377 U.S. at 437) and quoted in footnote 1 the applicable statutory framework under which the tax in question is imposed. As there indicated, the tax is imposed on persons "engaging within this state in the business of making sales at wholesale * * * equal to the gross pro-

ceeds of sales of such business." In construing the incidence of the tax under the facts and circumstances involved in *General Motors, supra*, this Court concluded:

"* * * The tax is levied on the incidents of a substantial local business in Washington and is constitutionally valid." (377 U.S. at 439)

As indicated by the Supreme Court of Washington in *Fibreboard Paper Products Corp. v. State*, 66 Wn.2d 87, 401 P.2d 623 (1965):

"* * * It is the situs of wholesaling, * * * that governs the tax on wholesaling. "The tax imposed here is a tax not on a thing but on an activity—a tax on the wholesaling activity within the state *measured by the gross proceeds from the activity.*"

There can thus be little question about the operating incidence of the tax in question. Under the Washington statute tax liability is predicated on the fact that Standard did engage in local wholesaling business activities in Washington for the period in question. (While it is not in the record, this Court may wish to take judicial notice of the fact that Standard, as shown by a public document on file with the Washington Secretary of State, attached hereto as "addendum A", was qualified as a foreign corporation to conduct an intrastate business in Washington for the period in question.) The fact that this local business was associated with its sales of products in interstate commerce does not convert the tax to one imposed on the privilege of engaging in interstate commerce precluded by *Spector Motor Service*,

Inc. v. O'Connor, 340 U.S. 602 (1951). The only question is whether or not the incidence of the tax and its measurement by wholesale sales to Boeing is supportable by the nature and extent of Standard's activities in this state.

In resolving this question, once a taxpayer has entered the state and carried on activities therein, the tax is properly imposed on local incidents measured by gross receipts from interstate sales if the taxpayer has exploited the market by performing substantial local services in relation to the establishment and maintenance of the sales by which the tax is measured. The test in determining whether such local services are "substantial" is whether the local activities are decisive factors in establishing and holding the market for the sales by which the tax is measured. *Norton, supra; General Motors, supra.* For purposes of due process, this is the degree of exploitive activity necessary to establish the "minimum connection", *Miller Bros. Co. v. Maryland, supra*, between the state and the person or transaction it seeks to tax consistent with "traditional notions of fair play and substantial justice." *Milliken v. Meyer, supra.*

In the language of *General Motors*, once a taxpayer carries on significant local activities within the state, the question of validity of a privilege tax on those activities measured by gross receipts is whether or not such local activities "* * * form some definite link, some minimal connection, between

a state and the person, property or transaction it seeks to tax." *General Motors, supra*, 377 U.S. 436, 448 quoting from *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954). In applying the definite link or minimal connection test in *General Motors, supra*, the Court, after setting forth the general principles applicable and reciting facts pertaining to General Motors' activities in Washington, concluded:

> "* * * we can only 'conclude that, in the light of all the evidence, the judgment attributing * * * [the corporation's Washington sales to its local activity] was within the realm of permissible judgment. Petitioner has not established that such services as were rendered * * * [through in-state activity] were not decisive factors in establishing and holding this market.'" 377 U.S. at 448, (Material quoted by the Supreme Court was from *Norton Co., supra*, at 340 U.S. at 538)*

Inasmuch as the facts establish that Standard came into the state of Washington to do a local business in connection with its wholesale sales and that this activity is clearly associated with its wholesale sales in this state, *Norton* and *General Motors* are dispositive of this case and establish the correctness of the decision of the Court of Appeals. These cases indicate there is no merit to either Standard's Due Process or Commerce Clause arguments.

It was the independent judgment of the two administrative and two judicial tribunals below that

*In the language of *Norton*:
"But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissoci-

the local activities of Standard were decisive factors in establishing and holding the Washington market for the sales by which the tax in question was measured. We turn now to an examination of the facts on record in order to demonstrate that the holding of the tribunals below was "within the realm of permissible judgment." *Norton, supra*, 340 U.S. at 538; *General Motors, supra*, 377 U.S. at 448.

The sales which constitute the measure of the tax in question consist of wholesale sales of highly specialized aerospace fasteners (e.g., nuts and bolts) manufactured by Standard in Pennsylvania and California and delivered to Boeing in Seattle. Standard during the relevant time period continuously maintained a resident "sales engineer" (Martinson) in Washington who devoted full time to servicing its buyer-seller relationship with Boeing.

It is the *effect* of this in-state activity and that of visiting personnel which is controlling here. *General Motors Corp. v. Washington*, 60 Wn.2d 862, 874, 376 P.2d 843 (1962), aff'd 377 U.S. 436 (1964). Viewed in the context of the nature of the product and the requirements of the purchaser, it is clear that the effect of Martinson's local activities and that of visiting personnel was to enable Standard to qualify as a Boeing supplier, and hence to make sales in Washington. As Martinson himself stated, Boeing

ated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." (340 U.S. at 537)

will not purchase any products without first conducting "qualification" tests of the product. (This is especially true with respect to the highly sophisticated fasteners used to hold Boeing's airplanes together.) Martinson spent 80 to 90 percent of his time in the Seattle area, where the qualification tests were made, talking with Boeing engineers, obtaining engineering drawings for products and doing whatever was necessary to ensure that Standard's products passed the qualification tests. It is apparent that Martinson's face-to-face contact with Boeing's engineers, and on-the-job monitoring of Standard's products undergoing qualification tests were decisive factors in enabling Standard to "qualify" as a Boeing supplier. Martinson could always be reached by a local telephone, and was immediately available to view first hand any problems arising in the qualification process. His employer obviously thought this physical presence in Washington was necessary to the successful qualification of its products; otherwise only out-of-state employees would have been used. In short, the record abundantly supports the conclusion that *but for* Martinson's in-state activities, Standard could not have sold a single nut, bolt, or rivet to Boeing. If this is not a *decisive factor* in establishing and maintaining these sales, one would be hard pressed to imagine what type of activity could be.

In addition to Martinson's activities in the "qualification process", he also devoted a portion of

his time to "problem solving" or "troubleshooting". Again, this required his immediate face-to-face availability to Boeing's engineers in order that he might discuss the problem with them, view for himself the nature of the particular problem, and, after a solution had been worked out by Standard's engineers, present the solution to Boeing engineers in a face-to-face meeting (A. 83). Standard also sent its engineers into Washington on a regular and systematic basis to meet with Boeing's engineers in respect to the use of its products by Boeing. Martinson arranged these meetings, and presumably problems related to the use of Standard's products were discussed and resolved. Certainly this was a decisive factor in enabling Standard to maintain Boeing as a customer.

Finally, Martinson performed the traditional outside salesman's duties of "scouting the market" and maintaining personal contact with customers for purposes of promoting rapport and goodwill. Exhibits A, B, and D, comprising correspondence between Martinson and his "sales manager" relating to potential users of aerospace fasteners, and Exhibit L, relating to prices and terms of Standard's competitors for the Boeing market, clearly fall within the traditional "scouting the market" function of an outside salesman. His activities with respect to arranging for a "hospitality room" at an aerospace engineering convention (Ex. C), and taking care of "visiting firemen" (A. 84) from Standard also

clearly fall within an outside salesman's traditional duties.

If these facts do not establish that Washington, as the market state, did not bear a special relationship to Standard's wholesaling activities in reference to the sales in question, it is hard to conceive what constitutes a special relationship. Furthermore, if these activities were not decisive factors in Standard's ability to establish and hold Boeing as a market for its wholesale sales, it is difficult to conceive what would constitute such factors. Not only were Standard's activities in Washington fairly related to its Washington wholesale business; they were absolutely essential and necessary in order for it to sell its products at wholesale to Boeing. It could not have conducted the necessary tests and obtained the necessary information to sell Boeing its products without these continuous and systematic in-state activities. Its in-state activities (local incidents) were specifically and unequivocally related to Boeing sales. There is thus no question about the special relation of Standard's activities in this state to its Washington wholesale sales.

The wholesale sales promotional effort of General Motors employees in Washington in regard to the wholesale sales there in question[9] is not distin-

[9]The promotional nature of General Motors activities in Washington concerning the exempt sales is appropriately characterized as follows in *General Motors Corp. v. State*, 60 Wn.2d 862, 875:

"All of these activities are related to sales of General Motors in the sense that they tend to strengthen dealer representation and stimulate consumer demand. Because of the very nature of the activities, it cannot be said that General Motors directly partici-

guishable from Standard's Washington activities which were conducted for the purpose of promoting its wholesale sales to Boeing.

In both *General Motors* and the case at bar, in-state activities pertaining to claimed exempt wholesale transactions were not directly related to obtaining and processing orders. The record in this cause, except for the acceptance of orders outside the state, is silent as to where and how the sales were negotiated and other terms and conditions of the sales including the place of acceptance of the products by Boeing. In *General Motors, supra*, the orders were accepted in Portland or at the factory and the products were shipped f.o.b. factory. *General Motors, supra*, 377 U.S. 436, 443.

Inasmuch as there is no substantive difference between Standard's activities in Washington concerning its wholesale sales to Boeing and the activities in Washington concerning the sales in question in *General Motors, supra, General Motors* is controlling precedent here.

2. *Contrary to Standard's argument, the activities of the Norton engineers in Norton, supra, are not comparable to those of Martinson in the instant case and were not shown to be related to Norton's direct interstate sales; therefore, Norton, supra, does not*

pates in particular retail sales. Yet the activities undeniably have a very great effect in terms of increasing total retail sales in Washington, thereby increasing also wholesale sales. All of the transactions measured by the tax imposed on these activities are in some degree affected by General Motors organized promotional effort."

support Standard's claim of tax immunity for the wholesale sales in question.

In a further effort to distinguish the *General Motors* case, *supra*, Standard relies heavily on this court's holding in the *Norton* case, *supra*, that the direct interstate sales of Norton, which were disassociated from the local outlet of Norton, were not subject to the Illinois Retailers Occupation Tax. Standard argues that Norton engineers performed the same activities in Illinois in regard to the exempt sales that its employees performed in Washington in regard to Boeing sales in question. Standard then concludes that the *Norton* case, *supra*, is direct precedent for its claimed exemption in the case at bar. This argument is fallacious for three reasons. First, there is nothing in the *Norton* record or in this court's decision in *Norton* that associated the Norton engineers' activities in Illinois with the exempt sales. Secondly, Standard's Washington activities are not comparable to the Illinois activities of the Norton engineers. Thirdly, if the Norton enginers' Illinois activities were associated with the exempt sales and were necessary in order for Norton to establish and maintain the Illinois market for these sales, the exemption of these sales in *Norton* would conflict with the basic rationale of the *Norton* decision.

The only reference to Norton's engineers in *Norton, supra*, is the following:

"* * * But no solicitors work the territory out of either the home office or the Chicago branch, although petitioner will supply engi-

neering and technical advice. * * *" (340 U.S. at 537)

We have examined the record in the *Norton* case. There is nothing in the record to indicate that Norton's engineers who worked out of the Chicago office had anything to do with the sales found to be exempt in *Norton*. The only evidence in the record in the *Norton* case concerning engineering activities was the following testimony set out on page 20 of the transcript of record, concerning activities out of the Chicago office of Norton:

> "* * * we have abrasive enginers who go out to the customer and advise him on technicalities of grinding wheels, what wheels would perform the work, etc.; the engineers go in the field after the order is in; they do not solicit; it is just technical advice; we have no men in the field from the Chicago office taking orders; * * *"

The Supreme Court of Illinois in *Norton Co. v. Department of Revenue*, 405 Ill. 314, 90 N.E.2d 737 (1950) in reference to the engineers stated:

> "There are no salesmen used by appellant, but it does have a group of engineers *available to consult* with prospective customers on their needs. These engineers do not solicit or take orders for goods." (Emphasis added)

There is no evidence or judicial statement in *Norton* that associated the Norton engineers' activities with any exempt sales in *Norton*.

Since this Court held in Norton that any exempt sales must be disassociated from local activities, this Court must have predicated its decision in *Norton*

concerning exempt sales on the premise that the activities of Norton engineers were not significantly or directly associated with the exempt sales.[10] Furthermore, the engineers involved in Standard's sales to Boeing visited the state. Martinson's activities in Washington were not the activities of an engineer. Standard in its brief consistently characterizes Mr. Martinson as an "engineer" solely to lend credence to its argument that the activities of Martinson were the same as the activities of the engineers in *Norton*, *supra*. Martinson was essentially a salesman. He had a degree in animal husbandry and no formal training in engineering; his supervisor was the sales manager; and Martinson referred to himself as one of the "outside people" (A. 84), an obvious reference to the "outside sales" department maintained by Standard.[11] (Ex. A)

Under these circumstances, it is error for Standard to argue, on authority of *Norton*, that its Washington activities are inadequate (i) to establish nexus (Washington jurisdiction to impose its B&O tax on Standard's Washington wholesale activities)

---

[10] For a proper interpretation of the facts and holding in *Norton*, the dissenting opinion of Mr. Justice Clark is instructive. He concluded that the direct sales (the interstate sales which did not involve the Chicago outlet) under the test laid down by the Court in *Norton* should also be taxable because the taxpayer had not established that the services rendered by the Chicago office were not decisive factors in establishing and holding the Illinois market for Norton's direct sales. Obviously, a majority of the court thought otherwise.

[11] In intracompany correspondence to the sales manager, Martinson stated "Let's go after this market and prove to ourselves that SPS [Standard Pressed Steel] can market a new product!" (Ex. D) This is sales talk, not engineering talk.

or (ii) to permit the tax in question to be measured by gross receipts derived from Boeing within the purview of the Commerce Clause limitations.

3. *Contrary to Standard's argument, it did engage in a local business in Washington of making wholesale sales; its Washington activities pertaining to this business were not de minimis; and all the necessary incidents of this business did not take place outside of Washington.*

In yet further efforts to distinguish *General Motors, supra*, from the case at bar, Standard argues (i) that its activities in this state are *de minimis*; (ii) that all of the necessary and material incidents of its wholesale activities took place outside Washington; and (iii) that it has not elected to compete as a local business. These arguments are completely refuted by the record in this cause and are based entirely on Standard's failure to recognize that the important consideration is not where the mechanics of sales are performed. In *General Motors, supra*, all the mechanical aspects of the wholesale sales of General Motors to its Washington retail dealers occurred outside the state of Washington. However, the Supreme Court of Washington and this Court on appeal found that the substance of General Motors' wholesale sales to its Washington dealers occurred in Washington where its customers were located and where the demand for the manufactured products existed, to a very large degree, as a result of General Motors' promotional activities. The important question is to determine the place of performance of the *sales activities*. The tax in question is imposed on Standard's wholesaling sales activities. The substance of the wholesale sales activity of Standard related to its sales to Boeing in Washington took place in Washington. The record discloses no out-of-state activity of Standard to effect these sales except for the mechanics of filling the orders. Thus, there is absolutely no basis for Standard to argue that it carried on only a *de minimis* part of its wholesaling activities in this state in reference to its sales to Boeing. The only incident of sale which the record clearly shows occurred outside of the state was the acceptance of the order. There is no indication where the negotiations took place; where title to the goods passed; whether the delivery terms were f.o.b. California, Pennsylvania, or Washington. On the other hand, it is clear that all the activities which enabled Standard to make sales to Boeing in the first place took place entirely within Washington. The six activities carried on in this state by Martinson were found as a matter of fact to be decisive in establishing and maintaining the market for Standard's sales to Boeing (A. 17, 27, 37). It is abundantly clear that *but for* the activities of Martinson in ensuring that Standard was a "qualified supplier" to Boeing, Standard could not have sold a single nut, bolt, or rivet in the state of Washington. Under these circumstances it is inconceivable that Standard would argue that all the necessary and material in-

cidents of its wholesale sales to Boeing took place outside of Washington.

Equally untenable is Standard's argument that it has not elected to compete as a local business, but rather is viewed by its customers (Boeing) as remote and inaccessible and therefore the tax is on the privilege of conducting a purely interstate business in violation of the Commerce Clause (citing *Norton Co. v. Department of Revenue*, 340 U.S. 534). The record simply does not substantiate this; rather it clearly establishes that Standard for the period in question elected to compete as a local business and was not viewed by Boeing as remote and inaccessible. Although Boeing dealt with out-of-state employees of Standard, as did General Motors' dealers in the *General Motors* case, for purposes of completing the mechanics of the sales transactions, all the necessary incidents preparatory to making the sales were distinctly localized in Washington. Standard could be served with process in Washington; its local sales representative could be reached by a local telephone call; the sales representative maintained face-to-face contact with Boeing's employees on virtually a daily basis; its out-of-state engineers visited the state and engaged in face-to-face conferences with Boeing employees in a regular and systematic manner. In short, the substance of Standard's wholesaling activity concerning its Boeing sales took place in Washington and nowhere else. There is absolutely nothing in the record to show that Standard

conducted any substantial wholesaling activity in reference to its Washington sales to Boeing except in the state of Washington. Furthermore there is no evidence in the record that Standard suffered any sort of competitive disadvantage over a local business by reason of conducting the mechanics of its sales to Boeing over the telephone or by use of the U. S. mail. Taken in its entirety, the record abundantly supports the conclusion of the lower court that Standard engaged in substantial local business with respect to making wholesale sales to Boeing.

4. *The Washington Wholesaling Business and Occupation Tax does not subject Standard to the risk of multiple tax burdens on its wholesale sales of products delivered in Washington to Boeing and this Court will not pass on this question as an abstract proposition.*

Standard would have this Court find, as an abstract proposition, that imposition of the tax in question would subject it to a risk of multiple tax burdens. There is not a scintilla of evidence to support Standard's contention that either California or Pennsylvania did or can tax the gross receipts from the wholesale sales in question. The record does not establish what sales activities associated with Standard's wholesale sales to Boeing actually took place in either California or Pennsylvania. There is no showing of how or where the sales were negotiated or consummated. Under these circumstances, this Court has consistently refused to pass on this question.

In *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959), a case dealing with an apportioned net income tax as applied to a foreign corporation, the Court stated at page 463:

> There is nothing to show that multiple taxation is present. We cannot deal in abstractions. In this type of case, the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do.

General Motors Corp. v. Washington, 377 U.S. 436 (1964), cites *Northwestern States Portland Cement Company v. Minnesota, supra*, with approval, and goes on to say at page 449:

> [Appellant] has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipment by which Washington measures its tax. And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of "multiple taxation", and we adhere to that position. (Citations omitted.)

In the instant case, since Standard has failed to show that the gross receipts in question are subject to tax by any state other than Washington, it asks this court to "deal in abstractions", and therefore has not properly presented a multiple burden question.[12] Furthermore, under applicable case law, the

[12]The court below, on authority of *General Motors Corp. v. Washington, supra*, stated that "• • • [T]he burden is upon the taxpayer to affirmatively show that its activities are subject to taxation elsewhere. • • • In this case we find no such affirmative showing other than the unsupported assertion in plaintiff's appellate brief that a multiple burden has been created." (Citation omitted.)

state of origin may not impose a gross receipts tax on these wholesaling activities; and thus even as an "abstract" matter, no multiple burdens could arise.

Standard cites *Gwin, White and Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), and *Freeman v. Hewit*, 329 U.S. 249 (1946), to support its argument that Pennsylvania and California can tax its sales to Boeing. These cases do not support this argument. To the contrary, they invalidated the taxes there imposed by the states of *origin* on sales in interstate commerce.

Gwin, White and Prince, Inc. v. Henneford, supra, simply holds that a tax imposed on in-state activities, which is measured by receipts from both in-state and out-of-state sales, is unconstitutional, because such a tax exposes interstate commerce to a risk of multiple tax burdens. In that case, the state of the *seller* was imposing a tax measured by receipts from out-of-state sales as well as in-state sales. In *Freeman v. Hewit, supra*, this Court invalidated the Indiana gross income tax on gross receipts derived by an Indiana *seller* from sales consummated out-of-state on the New York Stock Exchange. Again, in *Adams Manufacturing Company v. Storen, supra*, 304 U.S. 307 (1938), this Court refused to uphold Indiana's gross income tax on gross receipts derived by an Indiana manufacturer's sales to out-of-state destinations.

The principle that a state of origin cannot impose an unapportioned tax on or measured by gross

receipts from interstate sales was reaffirmed in *Evco v. Jones*, 409 U.S. 91 (1972), on authority of *Adams Manufacturing Company v. Storen*, *supra*, and *Gwin, White and Prince, Inc. v. Henneford*, *supra*. Significantly, the vice sought to be avoided by these decisions, namely, multiple state tax burdens on gross receipts from interstate sales, would not have been present if this Court had not recognized the power of the destination state to impose a tax on or measured by gross receipts from interstate sales. We are aware of no case and Standard cites none which denies the destination state the power to tax by application of the multiple burden test.

Alternatively, where the destination state has imposed a tax on or measured by receipts from sales of goods originating in other states, and there is sufficient local activity to establish jurisdiction to tax, this Court has upheld the tax. *General Motors Corporation v. Washington*, *supra*, 377 U.S. 436 (1964); *Field Enterprises, Inc. v. Washington*, 47 Wn.2d 852, 289 P.2d 1010 aff'd per curiam, 352 U.S. 806 (1956); *Norton Company v. Department of Revenue*, 340 U.S. 534 (1951); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1939). This is the method of taxation Washington has chosen to follow. (The *General Motors* and *Field Enterprises* cases involved the same tax which is challenged in the case at bar.)

The thrust of the decisions of this Court is to uphold taxation by the destination state and deny that

of the origin state. Standard asks this Court to reverse these decisions which uphold taxation by the destination state and in substance hold that the destination state cannot impose a tax on or measured by gross receipts if, as an abstract proposition, it can be argued that there is sufficient nexus in the state of origin to support such a tax. The same abstract argument is also valid to deny the state of origin the power to impose a tax on or measured by gross receipts if there is sufficient nexus in the state of destination to support such a tax. Thus, if this Court were to adopt Standard's multiple burden argument, neither the states of origin (California and Pennsylvania) nor the state of destination (Washington) of Standard's Washington sales to Boeing would have the power to impose a tax on or measured by Standard's gross receipts from Standard's Washington sales to Boeing. This is contrary to the holdings of this Court that interstate commerce must pay its own way. *Western Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938), *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252 (1919), *General Motors Corp. v. Washington*, *supra*.

In order to avoid multiple taxation of interstate sales transactions and require interstate commerce to pay its own way, when the state of destination has sufficient nexus to support a tax imposed on or measured by the receipts of interstate sales, this Court has consistently upheld the destination state's taxing power, and struck down that of the origin state.

Inasmuch as the state of destination provides the market for interstate sales and is the state which is more directly involved in furnishing the interstate seller substantial benefits and opportunities to establish and enforce its legal rights against the in-state purchaser, it is logical and fair that the state of destination rather than the state of origin be granted the power to impose a tax on or measured by receipts from interstate sales. So long as only the state of destination is allowed by this Court to impose a tax on or measure a tax by gross receipts from interstate sales, no risk of multiple burden exists.

In the case at bar, Washington is the state of destination of Standard's sales to Boeing. Sufficient nexus exists to support Washington's business and occupation tax on Standard's sales within the state. (Infra, pp. 21-27). Thus, it follows that Washington is the only state which can, consistently with this Court's decisions, impose a tax measured by Standard's sales to Washington customers.[13] A risk of a multiple tax burden patently does not exist.

---

[13] "In conformity to this Court's decisions, Washington does not include gross receipts from wholesale sales consummated by delivery outside the state in the measure of the business and occupation tax in question. Washington Administrative Code 458-20-193A, which is given the force and effect of law by RCW 82.32.300, provides that

"Where the seller agrees to and does deliver the goods to the purchaser at a point outside the state, neither Retailing nor Wholesaling business tax is applicable."

The Washington Supreme Court recognized, in *Crown Zellerbach v. State*, 45 Wn.2d 749 (1954), at 755, that this portion of the rule is constitutionally mandated by this Court's holding in *Freeman v. Hewit*, 329 U.S. 249 (1946).

CONCLUSION

Once again this Court has been called upon to pass on the constitutionality, under the Due Process and Commerce Clauses, of the Washington business and occupation tax imposed on the privilege of engaging in the business of making sales at wholesale within the state. It should be apparent that there are no constitutional objections to the tax as imposed on the local wholesaling activities of Standard, and therefore this Court should affirm the holding of the courts below.

First, it is beyond doubt that Standard has entered the state and exploited the local market by means of out-of-state employees visiting the state on a regular and systematic basis, and by means of maintaining a resident sales employee operating out of an office in his home maintaining continuous face-to-face contact with Standard's only significant customer in the state. Implicit in the entry of a foreign corporation in this manner is the understanding that it is entirely consistent with due process to require the foreign corporation to bear part of the cost of maintaining the market which the state provides, and which the foreign corporation effectively exploits by reason of its local activities. *Wisconsin v. J. C. Penney*, 311 U.S. 435 (1940). This is not a case of "mere entry", nor of *de minimis* activity; rather it is a case of continuous and systematic activity in the taxing state directly related to the sales which are the measure of the tax.

Second, once a foreign corporation has entered the state and engaged in substantial local activities, in order to avoid liability for tax it has the burden to disassociate its local activities from the sales which comprise the measure of the tax. *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). It is clear that Standard has wholly failed to meet this burden. The judgment of the Washington Court of Appeals (and three lower tribunals) that Standard's in-state activities were decisive factors in establishing and maintaining the local market for its sales in Washington is supported by substantial evidence and is clearly within the realm of permissible judgment. There is absolutely no indication that the activities of the engineers in *Norton* had anything to do with the *Norton* exempt sales, and Standard's attempt to equate the activities of its resident "sales engineer" with the activities of the *Norton* engineers is without foundation in fact or law.

Third, Standard has not met the requirement of establishing that the tax in question results in a multiple tax burden. There has been no showing that any substantial sales activity took place in Pennsylvania or California, so as to permit those states to impose a tax on the privilege of engaging in the business of making wholesale sales. In resolving the multiple tax burden question this Court has refused to deal in abstractions. *General Motors*, *supra*. Furthermore, in every case where a state's power

to tax receipts from interstate sales has been in question, this Court has upheld the destination state's power, *McGoldrick v. Berwind White Coal Mining Co.*, *supra*, 309 U.S. 33 (1939); *Norton*, *supra*; *General Motors*, *supra*; and denied the origin state's power, *Freeman v. Hewit*, *supra*, 326 U.S. 249 (1946); *Evco v. Jones*, *supra*, 409 U.S. 91 (1972).

Finally, it should be apparent from an examination of the record in this case that the wholesaling activities of Standard are indistinguishable for constitutional purposes from the in-state activities carried on by General Motors' sales personnel, and provide an adequate basis for assessment of the tax in question. For this court to hold otherwise would be a retreat from the policy underlying the *General Motors* decision—namely, that barring problems of insufficient nexus, discrimination, or multiple burdens, interstate commerce must pay its way—and would result in a return to the long discarded notion that interstate commerce may not be taxed at all.

For the foregoing reasons, the judgment of the Washington Court of Appeals should be affirmed.

Respectfully submitted,

SLADE GORTON,
Attorney General,

TIMOTHY R. MALONE,
Sr. Assistant Attorney General,

WILLIAM D. DEXTER,
Assistant Attorney General,

Attorneys for Appellee.

Addendum A

STATE OF WASHINGTON | DEPARTMENT OF STATE

I, **A. LUDLOW KRAMER**, Secretary of State of the State of Washington and custodian of its seal, hereby certify that according to the records on file in my office **STANDARD PRESSED STEEL CO.**, **a Pennsylvania corporation, qualified to do business in this state as a foreign corporation on February 23, 1960; and I further certify that the above named corporation is in good standing with all annual license fees paid to July 1, 1975.**

In witness whereof I have signed and have affixed the seal of the State of Washington to this certificate at Olympia, the State Capitol,

August 16, 1974

A. LUDLOW KRAMER
SECRETARY OF STATE

551 a

SUPREME COURT, U. S.
FILED
DEC 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

REPLY BRIEF OF APPELLANT

KENNETH L. CORNELL
and HAROLD S. FARDAL
KELLER, ROHRBACK, WALDO,
MOREN & HISCOCK
Attorneys for Appellant

Office and Post Office Address:
1220 IBM Building
Seattle, Wa. 98101
Telephone: (206) 623-1900

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

Page

Introduction 1

Counterstatement of Facts 2

1. Contrary to the State's Characterization of Appellant's Resident Agent as a Salesman, a Review of the Record Reveals Absolutely No Wholesaling Activity Conducted by Appellant Within the State of Washington 3

The Norton Engineers Did Perform Services in Connection With the Exempt Sales, Which Services Are Similar to Those of Martinson, and *Norton* Therefore Compels a Reversal in Favor of Appellant 6

1. *Norton* is Controlling Authority and Cannot be Materially Distinguished 6

2. Appellant Has Met the Burden of Establishing Its Claimed Immunity as Required by *Norton* 8

Contrary to the State's Contention, Martinson's Activities Are Distinguishable From the Sales Promotional Effort of General Motors Employees in Washington 9

Conclusion 11

TABLE OF AUTHORITIES

Table of Cases

General Motors Corp. v. Washington, 377 U.S. 436 (1964) 1, 9, 12

McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944) 7

Miller Bros. v. Maryland, 374 U.S. 340 (1954) 7

Nippert v. City of Richmond, 327 U.S. 416 (1946) 7

Norton Co. v. Dept. of Revenue, 340 U.S. 534 (1951) 1, 6, 7, 8, 11, 12

Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887) 7

Supreme Court of the United States

October Term, 1973

No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

REPLY BRIEF OF APPELLANT

INTRODUCTION

A review of the briefs previously submitted reveals the major differences between the parties to include the proper analysis and interpretation of activities performed by appellant within the State of Washington and the interpretation and application of the opinions of this Court in *Norton Co. v. Dept. of Revenue*, 340 U.S. 534 (1951), and *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).

The purpose of this brief is to clearly show that appellant conducted absolutely no wholesaling activity within the State of Washington and that the *Norton* and *General*

Motors decisions compel a decision in favor of appellant, reversing the opinion of the Washington Court of Appeals below.

COUNTERSTATEMENT OF FACTS

1. Contrary to the State's Characterization of Appellant's Resident Agent as a Salesman, a Review of the Record Reveals Absolutely No Wholesaling Activity Conducted by Appellant Within the State of Washington

As indicated by the appellee (hereinafter referred to for convenience as "State") in its brief, (Br. Appellee 6, 31) the subject gross receipts privilege tax is a tax on the privilege on conducting wholesaling activity within the State of Washington. A review of the record shows that appellant did not conduct substantial wholesaling activity within the State of Washington during the tax years in question, and therefore the tax is repugnant to both the due process and commerce clauses of the Federal Constitution.

The State has attempted to justify the imposition of the tax upon appellant by characterizing appellant's resident employee, Robert Martinson, as a "salesman" (Br. Appellee 14, 41, 44, 51). In attaching this label to Martinson, however, the State fails to point to any wholesaling or promotional activity conducted by Martinson. The State rather relies on the fact that Martinson's title was that of a "sales engineer", his immediate supervisor was the sales manager, and that Martinson did not have a formal degree in engineering. Such facts are not significant or relevant to the issues before the court. The relevant factual inquiry is what Martinson actually did in the State of Washington, to whom did he talk and about what, what did he spend his time doing, and is the nature of his activities such as to justify

the imposition of the unapportioned gross receipts privilege tax. The fact that Martinson's title was that of sales engineer does not make him a salesman or make his activity that of a salesman, any more than his title would make him an engineer. Similarly, the fact that his immediate supervisor was a sales manager is not relevant. Again, his activity in Washington is what is important. Likewise, the fact that Martinson did not have a formal degree in engineering does not change the nature of his activities. In this regard it should be noted that the State is clearly incorrect in its statement that Martinson had "no formal training in engineering". The record shows that appellant provided Martinson with substantial initial and on-going engineering and technical training. (A. 76, 77)

The fact that appellant is qualified to do business in Washington as a foreign corporation is also not significant. (Br. Appellee 31) It does not follow from such qualification that appellant actually did conduct business within the state. The qualification merely enables appellant to do business if they so chose. Once again, the State is relying on a "label" rather than focusing on the activities actually conducted within the state.

Similarly, the State's characterization of the sales activity occurring outside the state as being the mere mechanics of the sales is another attempt to shift the focus away from the actual in-state activities. (Br. Appellee 17, 43) Such characterization would seem to require that Martinson's activity be such that Martinson did everything but take the order. Such is not the case, however. Contrary to the State's assertion that there is no showing in the record of how or where the sales were negotiated or consummated.

the record is clear that all negotiations with Boeing occurred between Poeing and appellant's out-of-state offices. (A. 88, 93) The record is further clear that neither Martinson nor any employees present within the state at any time participated in these negotiations, either directly or indirectly.

The State's assertion that "but for" Martinson there could be no sales to Boeing (Br. Appellee 35, 43, 44) is a further attempt to shift the emphasis away from Martinson's actual activities, is an incorrect assertion, and also is not a valid test for determining the nature, amount or effect of Martinson's activity in Washington. Granted that there could be no sales to Boeing unless appellant qualified as an approved source and further that, under the particular procedure used while Martinson was employed by appellant, the company would receive a form from Martinson entitled "Products Engineering Request" before appellant's out-of-state offices would even consider qualifying a particular fastener. Under these facts, by using a simple cause-in-fact analysis, one could say, as does the State, that but for Martinson's activities there could be no sale because appellant would not even be a qualified source. But it does not follow that Martinson's activities were decisive factors in the Boeing sales, were necesary or essential to the Boeing sales, or that appellant could not make sales to Boeing without an in-state employee. In addition, as shown by the record, Martinson's employment was terminated prior to his deposition, and no one replaced him; yet appellant continued to makes sales to Boeing. (A. 76) The but-for test suggested by the State is also not a valid test to determine whether or not substantial sales activity has occurred or whether such activity is decisive. In the

same sense that but-for Martinson there could be no sales, the same could be said about the inventor of a product, the manufacturer of a product, a shipper, and an itinerant drummer, for example. These activities are not in any sense of the term "sales activities" or decisive factors to a sale. The fallacy of the State's analysis is apparent.

While the State does concede that the activities of the visiting engineer were solely for the purpose of working on engineering problems, and the engineers were not involved with the sales, (Br. Appellee 14) the State somewhat surprisingly characterizes these engineering activities as entering the state and exploiting the local market. (Br. Appellee 24, 51) There is certainly nothing in the record to support such a conclusion, and the State is unable to point to a single fact in the record to show or even imply that the visiting engineers conducted any sales activity in Washington.

In summary, unless the court takes the position that Martinson's enginering activities in connection with the qualification and trouble-shooting process constitute substantial wholesaling activities within the State of Washington, which appellant submits would be contrary to the *Norton* decision, there is nothing in the record to support the assertion that appellant conducted any in-state sales activity, or that his activities were essential, necessary, decisive or instrumental to the Boeing sales, and the imposition of the subject tax is therefore unconstitutional.

THE NORTON ENGINEERS DID PERFORM SERVICES IN CONNECTION WITH THE EXEMPT SALES, WHICH SERVICES ARE SIMILAR TO THOSE OF MARTINSON, AND *NORTON* THEREFORE COMPELS A REVERSAL IN FAVOR OF APPELLANT

1. *Norton* is Controlling Authority and Cannot be Materially Distinguished

Contrary to the State's assertion, (Br. Appellee 13, 39-41, 52) the only reasonable interpretation of this court's opinion in *Norton Co. v. Dept. of Revenue, supra,* is that the Norton engineers did in fact perform engineering services on the direct sales held to be exempt. As shown in appellant's opening brief, (Br. Appellant 17-19) it strains the imagination and flies in the face of common sense to conclude, as does the State, that the Norton engineers were somehow able to refrain from supplying engineering assistance to customers or prespective customers who order direct. In consulting with prospective customers as to their needs, how would the Norton engineers know whether or not the customer planned to order direct or not. And what would initiate such an inquiry of the customer prior to the *Norton* decision. It certainly is not reasonable to assume that these engineering services would not be provided to a customer who ordered direct but seeks engineering assistance and advice in the use of the product.

The State's further attempt to distinguish *Norton* on the basis that the interpretation advanced by appellant is contrary to the *Norton* "burden of disassociation" is likewise without merit. (Br. Appellee 40, 41) In this regard it is settled that the burden on a taxpayer of showing that in-state activity is not associated with in-state sales arises only when extensive and substantial activity is present, which activity if associated with in-state sales would support the imposition of the tax. As stated in *Norton Co. v. Dept. of Revenue, supra:*

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filing and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller." (340 U.S. at 537)

That a certain threshold of activity must be shown for the burden of disassociation to arise is also clear from such cases as *Miller Bros. v. Maryland,* 374 U.S. 340 (1954); *McLeod v. J. E. Dilworth Co.,* 322 U.S. 327 (1944); *Robbins v. Shelby County Taxing District,* 120 U.S. 489 (1887); and *Nippert v. City of Richmond,* 327 U.S. 416 (1946). In these cases, the activities involved, while obviously associated with in-state sales, were not sufficient to justify the imposition of the tax in the first instance, and therefore the taxpayer to prevail was not required to show that these activities were disassociated with the sales in question.

As the only reasonable reading of *Norton* is that the engineers did perform services associated with exempt sales, it is apparent that the court held these activities to be insufficient to justify the imposition of the tax, and therefore the Norton Co. did not have to meet the burden of showing such activities to be disassociated from the exempt sales to prevail. Similarly, in the present case, since appellant's in-state activity is not sufficient to justify the imposition of the tax, therefore appellant does not have to establish that such activities are disassociated from the sales in question.

2. Appellant Has Met the Burden of Establishing Its Claimed Immunity as Required by *Norton*

The State's contention that appellant has failed to challenge the "findings and conclusions" of the Court of Appeals below is confusing to appellant, especially in light of the State's own later contradiction of its contention. (Br. Appellee 25)

Throughout its opening brief, appellant challenged the conclusion by the court below that appellant's in-state activity was instrumental and decisive in the Boeing sales and constituted a sufficient local incident to justify its acts on constitutional principles. In fact, to briefly summarize appellant's position in this case, as found in appellant's opening brief, the conclusion by the court below upholding the imposition of the tax is beyond the realm of permissible judgment, is not supported by the record, and is in conflict with the previous decisions of this court, including *Norton Co. v. Dept. of Revenue, supra.*

As to whether or not appellant has "met its burden of proof", appellant recognizes that in constitutional cases such as the present case, the applicable standard of review is for the court to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that the court will re-examine findings of facts supported by substantial evidence.

Assuming that portions of the opinion of the Court of Appeals below can be separated out as factual findings and conclusions, which is always difficult in an appellate decision, this court is in as good a position as the court below to review the evidence, which is solely in written form, and

undue weight should not be given to any "findings of fact". In this regard, appellant is confident that the court, in exercising its own independent judgment, will agree with appellant that the imposition of the subject tax on appellant is repugnant to the Constitution.

CONTRARY TO THE STATE'S CONTENTION, MARTINSON'S ACTIVITIES ARE DISTINGUISHABLE FROM THE SALES PROMOTIONAL EFORT OF GENERAL MOTORS EMPLOYEES IN WASHINGTON

The State contends that the "basic question at issue is whether or not this cause is factually distinguishable for constitutional law purposes from *General Motors*". A comparison of the facts at the case at bar with the facts in *General Motors* reveals that the cases are distinguishable. In *General Motors* the in-state activity was all geared to sales promotion. In other words General Motors had as the purpose of its in-state activity the promotion of sales through the creation of a felt need by the consumer, and the further promotion of General Motors' products as being best able to fill such consumer's need.

In *General Motors Corp. v. Washington, supra,* this court took four pages to describe the sales promotion activities of General Motors employees in Washington. These activities included programs, plans and procedures to cause the dealer organization to give the best possible business representation in the area; assuring that dealers have a solid sales organization; acquainting dealers with divisional sales policies and promotional and training plans to improve the selling ability of the dealer; distributing promotional materials; advising dealers as to used car inventories; training the dealer sales force; preparing projections of esti-

mated needs which for all practical purposes were purchase orders; assisting in improving the dealer service departments and service department inventories to insure the best possible service to customers; and assisting in the disposition of used cars to appropriate display and reconditioning. General Motors also maintained a parts warehouse in Seattle from which parts were shipped to Washington dealers. The number of General Motors employees in the state assisting in the above-described activities were substantial. The bundle of corporate activity was significant, especially in comparison with appellant's activity in Washington. In addition, General Motors had extensive local business which it conceded was taxable. Based on the above, the court, in a five to four decision, determined that the bundle of corporate activity described above was sufficient to justify the imposition of the tax and further that General Motors failed to disassociate the local business from the activities described above. The *General Motors* decision represents the farthest extension of the power of a state to impose a gross receipts tax on interstate commerce.

In comparison with the activities carried on by Martinson in the State of Washington the contrast it striking. In no way can the nature, magnitude or effect of Martinson's activities be equated with the activities of General Motors in the State of Washington. The court below and the State cannot point to one activity conducted by Martinson within the state which compares with the activities of General Motors. The basic purpose of General Motors in its sales promotion in Washington was to "create" a belief, or build on such a belief on the part of a prospective customer that such customer needed a particular automobile or product,

and further convince such a prospective customer that a particular General Motors automobile or product best filled that need. In the case at bar, the Boeing Company engineers independently determined the Boeing needs for particular products and parts, including fasteners. This need results from Boeing design and specifications as determined by the Boeing engineers, and not from any activity by Martinson. Further, there is nothing in the record to indicate that appellant conducted any in-state activity "promoting" appellant's products as being better able to fill Boeing's minimum standards. Rather, this type of promotional activity was carried on in the negotiation stage, and the record clearly shows that absolutely no negotiations in connection with the sale took place in the State of Washington. The State further cannot point to any court decision in which a gross receipts tax has been imposed on activities so thin and insubstantial as those conducted by appellant in Washington. Certainly if such a case existed the State would have presented it in its brief.

CONCLUSION

In the case at bar the court is faced with two opinions pertaining to the permissible imposition of the business and occupation tax. In *Norton Co. v. Dept. of Revenue, supra,* where the facts are similar to those in the case at bar, the holding of the case dictates a judgment in favor of appellent. The State has failed to come up with any genuine and distinguishing features between the *Norton* case and the case at bar. In both cases the out-of-state company had a local engineer to assist the customer. In both cases, the engineer had nothing whatsoever to do with the actual sale of the product. In both cases, the result should be the same; namely, that the out-of-state company is not subject to the

gross receipts privilege tax, and any taxes paid should be refunded to the maximum extent permitted by law. *General Motors Corp. v. Washington, supra,* on the other hand involves a very different factual pattern, and appellant respectfully contends that both the court below and the State have erroneously applied the *General Motors* case to the case at bar, and on the basis of some very general and ambiguous language in the *General Motors* opinion, concluded that the *General Motors* case would somehow dictate a different result than would occur under the *Norton* opinion. This appellant respectfully contends is error, and appellant further contends that the application of the *General Motors* case by the Court of Appeals below is a radical extension of that opinion.

Since the activities performed by the Norton Company engineers and appellant's engineer are sufficiently similar in all material respects, on the controlling authority of *Norton,* appellant respectfully submits that the judgment below should be reversed and remanded with directions to refund to appellant the stipulated sum of $33,444.91.

Respectfully submitted,

KENNETH L. CORNELL
and HAROLD S. FARDAL
KELLER, ROHRBACK, WALDO,
MOREN & HISCOCK
Attorneys for Appellant